

TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1957

No. 81

NATIONAL LABOR RELATIONS BOARD,
PETITIONER

v.

UNITED STEELWORKERS OF AMERICA, CIO,
and
NUTONE, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petition for Certiorari

Filed February 20, 1957

Certiorari Granted April 1, 1957

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JOINT APPENDIX

1 IN THE UNITED STATES COURT OF
APPEALS FOR THE DISTRICT OF
COLUMBIA CIRCUIT

No. 12,754

UNITED STEELWORKERS OF AMERICA, CIO, *Petitioner*,

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent*.

Petition to Review and Modify an Order of the National Labor Relations Board—Filed June 23, 1955

Pursuant to the National Labor Relations Act, as amended, 61 Stat. 316, 29 U.S.C. Sec. 141 et seq., (hereinafter called the Act), the United Steelworkers of America, CIO, (hereinafter referred to as the petitioner or the Union) respectfully petitions this Honorable Court to review and modify, as hereinafter set forth, an Order of the National Labor Relations Board, dated June 13, 1955, by which petitioner is aggrieved. The proceeding resulting in said Order is known upon the records of the Board as "IN THE MATTER OF NUTONE, INCORPORATED AND UNITED STEELWORKERS OF AMERICA, CIO, Case No. 9-CA-704."

In support of this petition, and in accordance with Rule 38 of the rules of this Court, the petitioner states as follows:

*** * * * *
III

The Grounds on Which Relief is Sought

The petitioner alleges that the Board's decision and order herein is erroneous, contrary to law, arbitrary, and an abuse of the Board's power and discretion, insofar as the said Decision and Order:

- (1) failed to find that the Company engaged in interference, restraint and coercion within the meaning of Section 8(a)(2) and (1) of the Act by enforcing its no-solicitation, no-posting and no-distribution rule

against the Union while simultaneously itself engaging in anti-union posting, solicitation and distribution of literature;

(2) failed to find that the Company illegally dominated the Employee Committee and failed to order the Company to disestablish said labor organization;

(3) failed to order the reinstatement of Virgie Marshall and failed to order the Company to make the said Virgie Marshall whole for any loss of pay she may have suffered from and after August 18, 1953, by reason of the discrimination against her.

IV

The Relief Prayed

The petitioner prays:

(1) That this Honorable Court cause notice of the filing of this petition to be served upon respondent N. L. R. B.;

(2) That respondent N. L. R. B. be required to certify to this Court a transcript of the entire record in this proceeding;

(3) That the decision and order of the Board be reviewed and modified insofar as it is erroneous, contrary to law, arbitrary, and an abuse of the Board's power and discretion, as set forth in this petition;

(4) That the petitioner have such other and further relief as this Court may deem just and proper.

Respectfully submitted,

UNITED STEELWORKERS OF AMERICA, CIO
By DAVID E. FELLER
ARTHUR J. GOLDBERG,
General Counsel

DAVID E. FELLER
ELLIOT BREDOFF
Associates General Counsel
1001 Connecticut Ave., N.W.
Washington 6, D. C.

Date: June 22, 1955.

IN UNITED STATES COURT OF APPEALS

No. 12,812

NATIONAL LABOR RELATIONS BOARD, *Petitioner*,

v.

NUTONE, INCORPORATED, *Respondent***Petition for Enforcement of an Order of the National Labor Relations Board—Filed July 28, 1955**

To the Honorable, the Judges of the United States Court of Appeals for the District of Columbia Circuit:

The National Labor Relations Board, pursuant to the National Labor Relations Act as amended (61 Stat. 136, 29 U.S.C., Secs. 141, *et seq.*), hereinafter called the Act, respectfully petitions this Court for the enforcement of its order against Respondent, Nutone, Incorporated, Cincinnati, Ohio, its officers, agents, successors, and assigns. The proceeding resulting in said order is known upon the records of the Board as "Nutone, Incorporated and United Steelworkers of America, CIO, Case No. 9-CA-704."

In support of this petition the Board respectively shows:

1. Upon due proceedings had before the Board in said matter, the Board on June 13, 1955 duly stated its findings of fact and conclusions of law, and issued an Order directed to the Respondent, its Officers, agents, successors, and assigns. The Board's order dismissed certain allegations contained in the complaint and withheld certain relief sought in the complaint. On the same date, the Board's Decision and Order was served upon Respondent by sending a copy thereof postpaid, bearing Government frank, by registered mail, to Respondent's Counsel.

2. Pursuant to Section 10(f) of the Act, United Steelworkers of America, CIO, Charging Party in the proceedings before the Board, filed with this Court its petition to review that portion of the Board's order which dismissed certain allegations contained in the complaint and withheld certain relief sought in the complaint.

4. 3. In accordance with said petition to review, the Board, on July 27, 1955, filed with this Court a transcript of the entire record of the proceedings before the Board upon which the said order was entered, giving this Court jurisdiction under Section 10(f) of the Act. This transcript includes the pleadings, testimony and evidence, findings of fact, conclusions of law, and the order of the Board. This same transcript also constitutes the certified record in the instant enforcement proceeding.

4. Although Respondent herein is a New York corporation engaged in business in the State of Ohio, this Court has jurisdiction of this petition for enforcement by virtue of its exclusive jurisdiction over the entire proceeding upon the filing of the certified record in connection with the petition to review.

WHEREFORE, the Board prays this Honorable Court that it cause notice of the filing of this petition to be served upon Respondent, and that this Court take jurisdiction of the entire proceeding and of all the questions determined therein and make and enter upon the pleadings, testimony and evidence, and the proceedings set forth in the transcript filed in connection with the petition to review in No. 12,754, and upon the Order made thereupon, a decree enforcing those sections of the Board's said Order which relate specifically to the Respondent herein, and requiring Respondent, its officers, agents, successors and assigns to comply therewith.

(Signed) MARCEL MALLET PREVOST
Assistant
General Counsel

NATIONAL LABOR RELATIONS BOARD

Dated at Washington, D. C.,
this 28th day of July, 1955.

5. IN UNITED STATES COURT OF APPEALS

Nos. 12,754, 12,812

Prehearing Conference Stipulation—Filed August 25, 1955

Pursuant to Rule 38(k) of the Rules of this Court, the parties, subject to the approval of the Court, hereby stipulate and agree as follows with respect to the issues and the procedure and dates for the filing of the briefs and joint appendix herein.

6

I

ISSUES

These proceedings, initiated by the filing of charges by the United Steelworkers of America, began with a complaint issued by the General Counsel of the National Labor Relations Board alleging *inter alia*, that NuTone, Inc. had engaged in unfair labor practices prescribed by Section 8(a)(1), (2), and (3) of the National Labor Relations Act, as amended (29 U.S.C.A. 158(a)(1)(2) and (3)) by discriminating against three employees, by engaging in conduct which interfered with, restrained and coerced its employees in the exercise of the rights guaranteed them by the Act, and by interfering with, lending support, and assisting a labor organization—the NuTone Employee-Company Relations Committee. The Trial Examiner, after hearing, found that NuTone had engaged in the foregoing unfair labor practices and recommended a cease and desist order. Affirmatively, he recommended the withdrawal of recognition from the assisted union, reinstatement of two of the discriminatees with back pay (Della and Charlotte Puckett), and limited back pay to a third (Virgie Marshall) who, he concluded, had thereafter lost her right to reinstatement by reason of her misconduct. He recommended, on the other hand, that the complaint be dismissed with respect to other allegations of unfair labor practices, including an allegation that NuTone had dominated the NuTone Employee-Company Relations Committee within the meaning of Section 8(a)(2) and (1) of the Act.

The Board in its decision and order issued on June 13, 1955, adopted the Trial Examiner's conclusions and recom-

mendations except insofar as he found that NuTone had violated Section 8(a)(2) and (1) of the Act by distributing non-coercive, anti-union literature in the plant prior to a Board-conducted election while enforcing as to the employees its otherwise valid rule against distribution of union literature on company premises.

On June 22, 1955, the United Steelworkers of America filed in this court a petition to review (Case No. 7 12,754) the Board's failure: (1) to find that NuTone violated the Act by discriminatorily applying its no-distribution rule, (2) to find that NuTone illegally dominated the NuTone Employee-Company Relations Committee and to order its disestablishment, and (3) to order reinstatement and full back pay to Virgie Marshall.

On July 28, 1954, the National Labor Relations Board filed in this Court a petition for enforcement (Case No. 12,812), of its order against NuTone, Inc., and moved for consolidation of both proceedings. On August 8, This Court issued an order consolidating the proceedings "for the purpose of filing briefs, of filing a single joint appendix and for hearing."

A motion of NuTone, Inc. to intervene in No. 12,754, and a motion of the Steelworkers to consolidate the proceedings for all purposes or, in the alternative, to intervene in No. 12,812 are now pending unopposed by any party, before this Court.

The issues presented, in Case No. 12,812, are as follows:

1. Whether substantial evidence on the record considered as a whole supports the Board's finding that NuTone violated Section 8(a)(1) of the Act by interrogating employees concerning union activity in the plant, by soliciting reports on such activity and by promising benefits for so reporting, and by implying that an employee's lay-off was due to her union activity.

2. Whether substantial evidence on the record considered as a whole supports the Board's findings that NuTone's failure to recall Virgie Marshall, Charlotte Puckett, and Della Puckett after an economic lay-off was because of their union membership and activity.

3. Whether substantial evidence on the record considered as a whole supports the Board's finding that Charlotte

Puckett, while distributing union literature outside the plant gates, did not use such offensive language as to render her unsuitable for reinstatement.

The issues presented, in Case No. 12,754, are as follows:

4. Whether the Board may, under the circumstances of this case, deny the normal remedy of reinstatement and full back pay to Virgie Marshall on the ground that she used the offensive language disclosed by the record to other employees, while distributing union literature outside the plant gates after NuTone failed to recall her.
5. Whether an employer commits an unfair labor practice if, during a pre-election period, it enforces an otherwise valid rule against employee distribution of union literature in the plant, while, during that same period, itself distributing non-coercive anti-union literature within the plant in a context of other unfair labor practices, committed prior to the election period and thereafter.

Respondent, Nutone, Inc., in No. 12,812, asserting that NuTone Employee-Company Relations Committee is defunct, will not contest the validity of the findings or order relating to unlawful interference with the formation of, and illegal assistance and support the NuTone Employee-Company Relations Committee, which unfair practices occurred after the election. Petitioner Steelworkers in No. 12,754 for the same reason will abandon its contention that the Board erred in failing to find unlawful domination of the NuTone Employee-Company Relations Committee and in failing to order its disestablishment.

II

PROCEDURE WITH RESPECT TO FILING OF BRIEFS AND JOINT APPENDIX TO BRIEFS

For the purpose of facilitating the work of the Court and the parties, the parties agree that their briefs and the joint appendix thereto will be served and filed in accordance with the procedures hereinafter set forth:

1. NuTone and the Steelworkers will file their printed briefs on or before October 3, 1955. The Board will

file its printed brief on or before November 3, 1955. Reply briefs, if any, by NuTone and the Steelworkers will be filed on or before November 25, 1955. Should adherence to the aforesaid dates become impractical, the parties will, subject to the approval of this Court agree upon a revised set of dates.

2. In their respective briefs the parties will make their citations to the record by citation to the pages of the certified record as indicated in the Index to Certified Record, heretofore filed herein, instead of to pages in the printed appendix. Exhibits of the General Counsel and NuTone will be referred to, respectively, as "G.C. Sx." and "Co. Ex."

3. The parties will, on or before November 25, 1955, enter into a stipulation as to the portions of the record to be printed in the joint appendix. Failing agreement on such a stipulation, NuTone and the Steelworkers will, on or before November 25, 1955, each serve upon the other parties designations of the parts of the record which they desire to be printed in the joint appendix. Within 5 days after the receipt of such designations by NuTone and the Steelworkers, the Board will serve upon NuTone and the Steelworkers a designation of the parts of the record which it desires to be printed in the joint appendix. Within two days thereafter, NuTone and the Steelworkers will designate any additional portions of the record which they desire printed. Within 25 days thereafter, the joint appendix, to be printed by a printer mutually agreed upon, will be filed. Costs of printing, unless otherwise agreed to by stipulation, will be borne by each party in accordance with the portions of the record designated by such party.

4. In the joint appendix each page number of the record certified to this Court shall be printed in bold-faced type, centered on a line by itself, at the appropriate place on the printed page, and the usual numerical pagination of the joint appendix shall be printed in modern (i.e., light-face) type at the appropriate right or left hand side of the top of each printed joint appendix page. Omissions shall be indicated by asterisks.

5. It is further agreed and stipulated that any party and the Court, at and following the hearing in the case, may refer to any portion of the original transcript of record herein which has not been printed to the same extent and effect as if such portions of the transcript had been printed; it being understood that any portions of the record thus referred to will be printed in a supplemental joint appendix if the Court directs the same to be printed.

(Signed) THOMAS E. SHROYER
*Counsel for NuTone,
 Incorporated.*

10 (Signed) DAVID E. FELLER
*Counsel for United Steel-
 workers of America, CIO*

(Signed) MARCEL MALLET-PREVOST
*Counsel for National Labor
 Relations Board*

August 25, 1955

11 IN UNITED STATES COURT OF APPEALS

No. 12,812

Answer to Petition for Enforcement of an Order of the National Labor Relations Board—Filed September 12, 1955

Now comes the respondent, NuTone, Incorporated, by its attorneys and for its answer to the Petition for Enforcement filed in the above entitled matter states as follows:

Respondent avers, with respect to the findings of fact, conclusions of law and Order made and issued on June 13, 1955, that all of them are contrary to law and fact and that they are not supported by substantial evidence, the law or facts, except:

(1) Those portions of the Order which dismissed certain allegations contained in the complaint and which withheld certain relief sought in the complaint; and

(2) Those portions of the Order finding unlawful interference with the formation of, and illegal assistance

and support to the NuTone Employee-Company Relations Committee, and the remedies therefor.

Respondent admits all other allegations of said Petition.

WHEREFORE, it is respectfully prayed that said Order of the National Labor Relations Board issued on June 13, 1955 be set aside and declared for naught except as specified above.

(Signed) THOMAS E. SHROYER
Commonwealth Building
Washington, D. C.

(Signed) CHARLES A. ATWOOD
Union Central Building
Cincinnati, Ohio

Of Counsel:

POOLE, SHROYER & DENBO

Of Counsel:

FROST & JACOBS

Dated September 1, 1955
Washington, D. C.

[Certificate of Service]

18 BEFORE NATIONAL LABOR RELATIONS BOARD

IR-491
Cincinnati, Ohio

DIVISION OF TRIAL EXAMINERS, WASHINGTON, D. C.

Case No. 9-CA-704

NUTONE, INCORPORATED

and

UNITED STEELWORKERS OF AMERICA, CIO

Messrs. E. Don Wilson and Harry D. Campodonico for the General Counsel.

Messrs. Malcolm F. Halliday, Charles A. Atwood, and George R. Cassidy (Frost and Jacobs), of Cincinnati, Ohio, for Respondent.

Mr. Chester A. Morgan, of Cincinnati, Ohio, for the Union.
Before: George A. Downing, Trial Examiner.

**Intermediate Report and Recommended Order of Trial
Examiner—Filed July 30, 1954**

Statement of the Case

This proceeding, brought under Section 10(b) of the National Labor Relations Act as amended (61 Stat. 136), was heard in Cincinnati, Ohio, on April 26 and May 3-7, inclusive, pursuant to due notice. The complaint, issued on February 11, 1954, by the General Counsel of the National Labor Relations Board,¹ and based on charges duly filed and served, alleged in substance that Respondent had engaged in unfair labor practices proscribed by Sections 8 (a) (1), (2), and (3) of the Act by (a) discriminatorily discharging Virgie Marshall, Della Puckett, and Charlotte Puckett on June 9, and thereafter refusing to 19 reinstate them, and discriminatorily discharging John David Mills on July 29; (b) assisting, supporting, dominating, and interfering with the organization, administration, and operation of the NuTone Employee-Company Relations Committee (herein called the Employee Committee and the Permanent committee) on and after August 9; and (2) engaging in various specified acts of interference, restraint, and coercion on and after May 1.

Respondent answered, denying generally the alleged unfair labor practices. Among other things, it denied that the Employee Committee was a labor organization, admitted that Mills was discharged, denied that Marshall and the two Pucketts were discharged, but admitted that they had not been reinstated.

All parties were represented by counsel or other representatives, were afforded full opportunity to be heard, to examine and cross-examine witnesses, to introduce relevant evidence, to argue orally, and to file briefs and proposed findings of fact and conclusions of law. The General Counsel made an oral argument. Respondent has filed a brief.

¹ The General Counsel and his representatives at the hearing are referred to herein as the General Counsel and the National Labor Relations Board as the Board. NuTone, Incorporated, is referred to as Respondent and as NuTone, and the charging Union above as the Union.

The summary of the pleadings below includes amendments made at the hearing. All events occurred in 1953, unless otherwise stated.

Upon the entire record in the case and from his observation of the witnesses, the undersigned makes the following; Findings of Fact

I. The business of Respondent

Respondent, a New York corporation, has its principal office and place of business and plant at Cincinnati, where it is engaged in the manufacture of door chimes, ventilating fans, electric heaters and other electrical devices. Its annual sales and shipments to extrastate points exceed \$500,000. It is therefore engaged in commerce within the meaning of the Act.

II. The labor organizations involved

The Union is a labor organization which admits to membership employees of Respondent.

It is also found that the Employee Committee is a labor organization. See Section III, D, *infra*.

20

III. The unfair labor practices

A. *Introduction; synopsis of main events and issues*

Respondent employed normally some 700 employees in some 25 different departments. Its supervisors, to the extent that they are identified by the record, were J. Ralph Corbett, president, Henry Mann, director of industrial relations, Robert Schaeffer, Ken Yancey, Howard Fisher, Stella Millichamp, John Humig, Bernie Gray, and Myron Theetge.

Although the Union had made some preliminary efforts toward organizing NuTone's employees in April and May, it did not show its hand openly until after a layoff on June 9, of nine employees, including Virgie Marshall and the Pucketts, who had joined the Union shortly before. The first Union leaflet was distributed June 11. A representation petition was filed on July 16, and the election, held on August 19, was lost by the Union.

Respondent began recalling the laid-off employees on June 23, but did not recall Marshall or the Pucketts, for the reason (asserted at the hearing) that they

had created a scene and had used abusive language at the time of the layoff. Respondent discharged John David Mills on July 29, for the asserted reason that he had falsified an entry on his production card.

The General Counsel offered testimony concerning various alleged incidents of interference, restraint, and coercion, such as interrogation, solicitation of employees to report on Union activities, and the discriminatory application of no-solicitation and no-distribution rules.

Marshall and the Pucketts participated actively in the election campaign, roughly from August 1 to 19, distributing literature to employees outside the plant. Witnesses for Respondent attributed to Marshall, and to a lesser extent to Charlottie Puckett, vulgar and obscene statements, cursing, and name-calling.

21. The Union was actively and openly opposed during the election campaign by a group of employees who first called themselves "NuToners for NuTone" and later the "Loyalty Group". The leaders of that group led a movement, after the election, to form first a temporary organization, known as the Temporary Committee, and then a permanent organization known as the NuTone Employee-Company Relations Committee, or the Employee Committee. The General Counsel offered evidence of various acts of assistance and support by the Company to those committees in September and since.

The main issues under the evidence are whether the Mills discharge and the failure to recall Marshall and the Pucketts were motivated by their Union activities, and whether, if discrimination be found, the three latter employees engaged later in such serious acts of misconduct as to warrant denial, as to them, of the usual remedy of reinstatement. Issues of lesser importance concern interference, restraint, and coercion, the evidence on which is in part disputed, and support and assistance to the Employee Committee, on which the evidence is not greatly in dispute, though the question of the Committee's status as a labor organization is in issue.

B. Interference, restraint, and coercion

1. Interrogation and solicitation to report on Union activities.

Thelma Collier testified, without denial, that in mid-May she had a conversation with Robert Schaeffer concerning the Union, during which Schaeffer inquired whether Collier had seen any girls signing Union cards and told her that if she did, she should give him their names. When Collier countered, "Do you want me scalped?" Schaeffer replied, "Don't worry about the girls in here. Mr. Corbett will take good care of you. You will never be let go."

Dan Deaton testified, also without denial, that about a month before the election, his foreman, Bernie Gray, asked him, "if you see any of the boys passing out 22 Union cards or anything, will you come and tell me."

Hattie Laymons testified, again without denial, that on or about June 12, Gray talked with her about Marshall's layoff, commenting in part that Marshall "should have known better than to get messed up in that damn Union."

It is concluded and found that the interrogation by Schaeffer and Gray of Collier and Deaton concerning the latters' knowledge of Union activities, the solicitation to report on those activities, and Schaeffers' promises of benefit in that regard, constituted interference, restraint, and coercion within the meaning of Section 8(a) (1) of the Act. Cf. *Coca-Cola Bottling Co. of Louisville*, 108 NLRB No. 81, 34 LRRM 1040, 1042. Gray's comment to Laymons was similarly violative of the Act, since it plainly implied that Marshall's layoff was due to her Union activities.

Laymons also gave testimony about a coercive conversation with Stella Millichamp, which Millichamp denied. Laymons testified that Millichamp inquired about a Union badge she was wearing, told her that she should be ashamed, and said, "Hattie . . . why don't you get some sense, . . . You know better than that . . . and get out of that mess . . . If the Union gets in here . . . you know that there's going to be a hell of a mess . . . Your bonus can be taken away and there is nothing you can do about it." Lay-

mons' version of the conversation cannot be accepted for the following reasons:

When called originally, Laymons testified that she had "just one" conversation with Millichamp concerning the Union. Called in rebuttal after Millichamp had testified that the conversation had its roots in an earlier incident, Laymons admitted the earlier conversation with Millichamp concerning the Union, but gave a version of that one also which was of coercive content. Though neither witness was corroborated directly, Millichamp's 23 testimony received indirect corroboration on one point from the General Counsel's witness, Virgie Marshall. Furthermore, the evidence as a whole showed that Laymons had a decided tendency to emotionalism and that she was emotionally upset on the two occasions.

Thus, Millichamp testified that the first conversation had grown out of an incident involving the distribution of Union literature by Laymons' son, Bob, who was not an employee of the Company. Laymons came to her crying the next morning in the dressing room and reported that Marshall had given her son some Union literature to pass out; that she had "cussed out" Marshall at the time; that she wanted no part of it; and that she asked Millichamp if she would be laid off. Millichamp assured Laymons that the Company did not lay off employees for anything like that.

Neither Millichamp nor Laymons fixed the time of that incident, but Marshall's testimony fixed the distribution of the literature as on the afternoon of June 11. Marshall's testimony also showed that Laymons had been greatly upset when she discovered that her son was assisting in the distribution of Union literature. Thus, Marshall testified that when Laymons came out of the plant that afternoon and saw what her son was doing, she shouted across the street to him, "Bob, get over here and get in the car . . . what are you doing out here, trying to get me fired? . . . You know I have to work."

As to the second conversation (which had formed the subject matter of Laymons' testimony in chief), Millichamp testified that, seeing Laymons wearing a button, she asked what it was, and that Laymons informed her it was a Union button. Then, referring to Laymons' earlier

disclaimer of interest in the Union, Millichamp asked,
"Why did you lie to me?"

24 For the reasons given above, Millichamp's testimony, which was indirectly corroborated in part, and which, as a whole appeared more objective and reliable than Laymons', is credited. It affords no substantial basis for a finding of unfair labor practices. Thus, in the initial incident, she merely sought to calm Laymons in her emotional appeals for assurances against discharge. In the latter incident, Millichamp's inquiry, on learning that what Laymons was wearing was a Union button, was an understandable impulsive reaction to Laymons' earlier emphatic disavowal of interest in the Union; it cannot be found violative of the Act, under all the circumstances. Cf. *United States Gypsum Co.*, 93 NLRB 966, 968.

Estel Frost testified that on numerous occasions during the two weeks before the election Alma Patton had pulled CIO buttons from his clothing and had pinned or attached to him NuToner badges or tickets which were being worn by some employees as a symbol of adherence to the so-called "Loyalty Group." Frost admitted he made no attempt to pull away or to resist, that he was on good terms with Patton, and that she was acting in humorous fashion. Patton flatly denied Frost's testimony. The General Counsel offered no corroboration of Frost, though Frost claimed the incidents had occurred in the presence of other employees.

Frost's testimony cannot be credited, in the absence of corroboration, over Patton's denials. His testimony here, as in the washroom incident (summarized with other evidence concerning Mills' discharge, Section C, 2, *infra*), bordered on the incredible; at best it would be consistent only with the view that Patton was acting wholly in fun.²

² Aside from the foregoing, it is questionable whether the General Counsel established, by a preponderance of the evidence, that Patton was in fact a supervisor. The evidence suggests strongly that she was not. Thus, there were only 12 employees in the department at the time, under Foreman Howard Fisher. Though Patton, as group leader, had some authority over the other employees, the evidence as a whole indicated that the authority she exercised was merely of a routine nature and did not require the exercise of independent judgment. Indeed, the General Counsel's evidence furnished significant support for the view that to the extent that she gave orders, she was serving only

25 Mills testified that Humig once asked him whether he thought CIO would get into NuTone and that he replied affirmatively. Though Humig was not examined specifically about, and did not directly deny, that testimony, he testified on cross-examination that he had had only a single conversation with Mills (or any other employee) concerning the CIO's attempts to organize, and that Mills had sought permission from him to speak with Corbett about organizing for CIO. It is found, therefore, that Humig in fact made the inquiry during the discussion which Mills had initiated, and that, under the circumstances, Humig's casual inquiry cannot be found coercive either in intent or effect.

2. Discriminatory application of rules

Prior to, during, and after the Union's organizing campaign the Company had in effect rules which prohibited the posting of signs of any kind on Company property, solicitation of any kind on company time, and the distribution of literature on Company property, including the parking lot on which many of the employees parked their cars. Despite those rules, Mann admitted that the Company itself regularly posted signs throughout the plant, on bulletin boards and walls (1 or more signs in each of 25 to 30 departments) and that it distributed literature for its own purposes and for charitable causes or drives such as the Cancer Fund, the Community Chest, and the Heart Foundation.

26 After the election campaign got under way around the first of August, the Company emphasized its rules by issuing and *posting* written notices, dated August 5, 10, and 12, respectively, as follows:

RULE ABOUT USING COMPANY PROPERTY

It must be understood throughout the entire plant that the Company does not permit posting of signs—of any kind—on company property. I would appre-

as a conduit for messages from Fisher. Thus, Charlottie Puckett testified that on the afternoon of the layoff, Patton brought the message, "Fisher said for you girls to have your timecards made out by 4:15." Patton's status thus closely resembled that of forelady Flossie Howard, who, in *Poultry Enterprises, Inc.*, 106 NLRB No. 15, was held not to be a supervisor.

ciate it if all employees—regardless of how they feel on the union issue—would avoid attaching signs to company property. Wherever we find them—we will be compelled to destroy such signs.

To: All Foremen

SUBJECT: Rule about Soliciting And Campaigning on Company Time.

It must be understood by all employees that the company does not permit soliciting and campaigning on company time. This applies to both sides of the union issue. Such activity must be confined to the employees' own time.

To: All foremen

SUBJECT: Rule about passing out literature on company property.

This is a warning to all employees—whether they are for or against the union—that the company does not permit employees to pass out handbills or other literature on company property. People who engage in such activities must stay outside of the Company property line which is the inner edge of the sidewalk.

Will you please post this notice in your department?

The evidence establishes that, prior to the election, those rules were enforced uniformly as between the Union and the "Loyalty Group," but that the Company itself violated them repeatedly by distributing antiunion leaflets, bulletins, and letters in the plant. Beginning promptly 27 after the Union's first distribution on June 11, and continuing until the eve of the election on August 18, the Company distributed to the employees in the plant eight separate pieces of antiunion propaganda.³ Thus, though professing neutrality as between prounion and anti-union employees, the Company itself entered the anti-

³ The General Counsel pointed to no specific statement in that series which he claimed to constitute interference, restraint, or coercion.

union lists and actively campaigned for the Union's defeat on a field to which it denied admittance to the Union. The discriminatory application of its rules was emphasized by the fact that one piece of the Company's campaign material was distributed on the very date on which the Company posted its third rule, quoted above, which prohibited employees from passing out literature on Company property.⁴

Following the election and the Union's defeat, the Company even more openly demonstrated the discriminatory application of its rules. The relevant evidence, summarized in detail under Section D, *infra*, need not be set forth here in full. Suffice it to say that it shows that Respondent ignored its rules completely in permitting—indeed, in assisting—the Temporary Committee (successor to the "Loyalty Group") and the permanent Employee Committee, to distribute literature, to solicit and campaign, and to conduct an election on Company time and property.

28 Respondent's rules were not, of course, so broad that, in and of themselves, they constituted unwarranted and unlawful interference with the employees' undisputed rights of self-organization,⁵ nor does the com-

⁴ The Company also mailed to the employees between June 12 and the election some ten other pieces of campaign material. The General Counsel did not contend that such action constituted a discriminatory application of the Company's rules and did not claim that any portion of the contents of the matter so distributed to be coercive except for one which contained a paragraph appealing to the young employees and which concluded, "Don't let the Union take away your future opportunities at NuTone. Don't get mixed up in strikes." Though arguing that the statement constituted a threat by the Company to take away job opportunities if the Union came in, the General Counsel stated he would submit authority to support his position. However, he filed no brief or memorandum of authorities, and the statement cannot be found coercive in the context in which it appeared as it does not establish the inference which the General Counsel would draw from it.

⁵ Cf. *Seamprufe, Inc.*, 109 NLRB No. 2.

Prohibiting the distribution of literature on the parking lot did not, under the circumstances shown by the record, constitute an unreasonable impediment to communication, cf. *Monarch Machine Tool Co.*, 102 NLRB 1242, enf'd. 210 F.2d 183, 186 (CA 6), cert. den. May 17, 1954, 34 LRRM 2143, since distribution was as effectively made from the sidewalk, immediately adjacent, as on the lot itself. Furthermore, the rule was applied without discrimination of any kind insofar as the parking lot was concerned.

plaint so charge. What is under question is Respondent's conduct in applying its rules discriminatorily so as to interfere with those rights.

It is immaterial in that connection that before the election the Company enforced its rules uniformly as between the Union and the Loyalty Group, nor is it necessary to rest a finding of discrimination only on such exceptions as were reflected by the Chest and Fund drives. For, as has been found, the Company broke its own rules openly and flagrantly by campaigning against the Union in the normal arena, and the most effective one for reaching the employees, cf. *Bonwit Teller, Inc. v. N.L.R.B.*, 197 F 2d 640, 645 (CA 2), while simultaneously denying access to it by the Union. Emphatic evidence of its discriminatory intent was furnished, after the Union defeat in the election, by Respondent's complete ignoring of the rules in assisting the organization of the Employee Committee.

It is, therefore, concluded and found that by discriminatorily applying its no-posting, no-solicitation, and no-distribution rules for the purpose of hindering and combating the Union's organization campaign, Respondent engaged in interference, restraint, and coercion within the meaning of Section 8(a) (2) and (1) of the Act.

C. Discrimination

1. The Layoff; the failure to recall Marshall and the Pucketts

Due to a drop in orders and an engineering change, Respondent closed down 2 of 3 lines in its Chime B department at the end of the work day on June 9. The 9 employees on the 2 lines were laid off, but 3 others in the department, who were engaged in other work, were retained. Included in the layoff were Virgie Marshall and the Pucketts (herein called Della and Charlottie, respectively), who had shortly before joined the Union. There is no evidence however, that Respondent was aware of their union membership at the time, or that

Respondent's action constituted a discharge, or that the layoff was not made for the reasons which Respondent assigned.⁶ What is in issue under the evidence is whether Respondent's failure to recall the 3 girls on or around June 23 (when other employees with less seniority were recalled) was motivated by knowledge, acquired shortly after the layoff, of their Union membership and their participation in the Union's organizing campaign, or whether, as Respondent contends, its decision not to recall them was because of a scene which they created at the time of the layoff.

The evidence surrounding the layoff itself is not in significant dispute, except as to the use by Marshall and Charlottie of profanity. The incident occurred in two segments, one in the department when Fisher announced the layoff, and one in Mann's office where the 3 girls went later. Fisher's announcement was made shortly before quitting time, and according to Respondent's witnesses, it provoked a heated reaction from Marshall, who made a comment in their hearing to the general effect that she knew when she was transferred into the department that that g—d—Fisher, or that s—o—b—Fisher, would get rid of her, or lay her off. Marshall denied making those statements, and the Pucketts testified that they did not hear her do so. However, the evidence as a whole, including that which is elsewhere summarized in this report, establishes that Marshall, when aroused, was addicted to the use of profane and indecent language. Marshall admitted that she was angry at the time and that she suggested to some of the girls that they go to the office about the layoff. Under all the circumstances, her denials are not credited.

Marshall and the Pucketts went immediately to Mann's office, and there, according to Respondent's witnesses, Marshall continued her use of profanity and abusive lan-

⁶ Gray's remark to Laymons' (Section B, 1, *supra*), which implied a causal connection between Marshall's layoff and her Union activities, will not support a finding that the layoff was discriminatorily motivated, since Gray was not in or over the department involved, had no connection with the layoff, and was, so far as the record shows, without knowledge either of the reasons for the layoff or the basis of selection of the employees.

guage in a heated conversation.⁷ The evidence is not in dispute that Marshall protested vigorously their selection for layoff and that she used abusive language in doing so. The conflict concerns only the extent to which she used such language, whether she cursed, and the exact words she employed. Briefly, Marshall and the Pucketts admitted only that Marshall had at one point referred to Corbett as "that old bastard," whereas Mann testified that she applied that term and s— o— b— to both Corbett and Fisher, and that she also said the layoff was a g— d— dirty trick to beat her out of her vacation pay.

Mann's testimony received corroboration from Carolyn Essert, who, passing the office, heard one of Marshall's statements within, and from Irma Flannelly and Genevieve Bolton, who heard Marshall cursing as she left the office. Their testimony, which is mutually corroborative, is credited over Marshall's denials; it persuades the undersigned that Mann's version of Marshall's language is to be credited, particularly in view of the partial admissions by Marshall and the Pucketts.

Mann also attributed to Charlottie statements substantially the same as those which Marshall had made, but that testimony was not corroborated by any witness, and Marshall and the Pucketts denied it. Their denials are credited.

Respondent contended that its decision not to recall the three girls, though made subsequently, was based on that "scene" and on the abusive language used on the occasion. Mann testified that the decision was reached the next morning. However, he identified termination forms which had originally contained a notation in each case that the employee would be reemployed, and he admitted that on June 12, he had changed each notation to one that the employee would not be reemployed, for the reason, noted by him:

⁷ There was no evidence that Della Puckett said or did anything untoward on the occasion. Indeed, Mann admitted that Della was more or less an innocent or silent participant. Though he testified that Charlottie also used abusive language, that testimony was overborne by that of the other witnesses, as hereinafter found.

Created a scene in personnel office at 4:30 on 6-9-53.
Used abusive language about Mr. Corbett and the Company.

Though admitting that that entry was the only record of the decision not to recall, Mann endeavored to explain the date as being simply the date of entry, testifying that the delay was due to the fact that he was behind on his record-keeping operations. However, Mann testified he could not recall that he had in fact made the entry on June 12, but only assumed that he had because the notation bore that date.

The Examiner is convinced from the entire evidence in the case (1) that the decision not to reemploy was reached in no case prior to June 12, and (2) that in any event it was motivated, not by the alleged scene, but by Respondent's knowledge that the Union had begun an organizational campaign and that the three girls were actively supporting it.

32 The evidence is conclusive on the score of knowledge. Thus, on the night of June 9, Marshall (in company with Ray Sowder, union organizer) solicited Rose DeAngelis to join the Union, and informed DeAngelis that she and the Pucketts had signed Union cards. DeAngelis promptly reported the conversation to Millichamp at the plant the next morning. On the afternoon of June 11, the Union made its first distribution of literature at the plant. Though its handbill made no direct reference to the layoff or to Marshall and the Pucketts, Marshall was present at the time and was "cussed out" by Hattie Laymons for involving her son in the distribution. As recounted under Section B, 1., *supra*. Laymons made a full report to Millichamp the next morning. As also recounted under that section, Bernie Gray commented to Laymons on or about June 12, that Marshall "should have known better than to get messed up in that damn Union."

Under the foregoing circumstances it was of crucial importance to the Company, if it had in fact made an earlier decision not to recall the 3 girls, that a correct record be made of that fact. It is incredible that a witness of Mann's intelligence would have failed to enter the earlier date, if it was in fact the *correct one*, since it would have lent support to the Company's position in event of

future charges or other attempts by the Union to capitalize on the layoff or the failure to recall the girls.

Subsequent events emphatically support the conclusions both that the decision was made belatedly and that it was unrelated to the layoff incident. Thus, despite several subsequent contacts between Respondent and the 3 girls, it not only did not inform them that they were no longer employees, or would not be reemployed, but *informed them they would be recalled*. On the first occasion, some 3 or 4 days after the layoff (and subsequent to June 12), Della called the office and talked with Yancey, in Corbett's absence. Yancey assured her that she would

be recalled soon, and on her inquiry, stated that Marshall and Charlottie would also probably be called back. No denial was made of that testimony. On June 15 (knowing that the girls were attempting to obtain unemployment compensation), Mann advised the Ohio Bureau that they had left NuTone's employ because of lack of work, but did not inform it that they were ineligible for rehire.

On July 16, Marshall and Charlottie spoke to Mann separately about being recalled to work. Mann told Marshall he had been expecting her back, that he had not called her because there was nothing open for group leaders, but that he would check up to see if there was other work, and would call her the following Monday. He has not since called her. Charlottie's interview was to similar effect, ending with the same promise to call. Mann did not call her either.

On July 21, Mann wrote Della Puckett to contact him about an opening as a packer in which he could use her, but informed her that if she did not call him by July 24, he would assume she was not interested in returning. Due to the fact that the letter was improperly addressed, Della did not receive it until the 28th.⁸ She immediately called Mann, informed him what had happened, and asked if she could report to work the next morning. Mann promised to call her that afternoon, but did not do so.

⁸ In the meantime, the original charge had been served on Respondent on July 22, claiming discrimination against the three girls.

Mann's testimony offered no substantial refutation of the foregoing, save that he contended that in each instance he had told the employee *to call him*, and that none of them did so. His testimony, being overborne by that of the 3 witnesses for the General Counsel, is not credited.

34 Thus, the evidence in its entirety shows, and I find,

(1) that Marshall and the Pucketts were not discharged on June 9; (2) that the lay-off was for legitimate business reasons and that the selection of Marshall and the Pucketts was not motivated by their Union membership or activities; (3) that neither Della or Charlottie Puckett engaged in misconduct at any time during the layoff incident; (4) that in presenting to Mann, along with Marshall, their grievances concerning their layoff and their vacation pay, the Pucketts were engaged in protected concerted activities, discrimination for which is proscribed; (5) that Marshall's conduct on the occasion was not such as to constitute unprotected concerted activity as to her; (6) that the decision not to recall the girls was not made until June 12, or later, and after Respondent had learned of the organizational campaign and of their participation in it, cf. *Miami Coca-Cola Bottling Co.*, 108 NLRB No. 83, 34 LRRM 1031; (7) that the decision, when made, was unrelated to the layoff incident, but was made with calculation and intent to restrain and discourage Union membership and activities;⁹ and (8) that but for the discrimination against them, the 3 employees would have been recalled on June 23, when other employees with less seniority were recalled.¹⁰

It is, therefore, concluded and found that by failing to recall Marshall and the Pucketts on June 23, Respondent engaged in discrimination within the meaning of Section

⁹ The evidence showed, among other things, that the use of profanity was not unusual in the plant (cf. *Miami Coca-Cola Bottling Co.*, *supra*), and that Respondent's supervisors were sometimes offenders. Furthermore, Respondent invoked its decision against the Pucketts also, though conceding that Della had said nothing objectionable and though the evidence did not support its claim that Charlottie had.

¹⁰ In fact, Respondent's campaign literature went so far as to claim that Respondent recognized plant-wide seniority and that, in event of a layoff, it transferred employees to other departments to keep them busy.

8(a) (3) of the Act. Evidence of election campaign misconduct in August, which Respondent relied on as an affirmative defense to reinstatement, is summarized in Section E, *infra*.

2. The discharge of John David Mills

Mills was employed some 7 months as a production sprayer. He had been elected, around July 1, to the Union's organizing committee within the plant and was very active in signing up applicants for membership. About a week before his discharge, he and the other four Union committee-men called on Corbett and Mann and informed them that they were bringing the Union's organization campaign into the open and were proposing to solicit membership on Company property, but not on Company time. Corbett gave his approval.

On July 29, Mills was summarily discharged on the asserted ground that he had "fattened" (I.E., falsified) the premium count on his production card for the preceding day, specifically, that he had entered on the card a total of 474 No. 810 fan blades, whereas he had sprayed only 175.

The evidence is undisputed that Mills had in fact sprayed only 175 of the particular item; and the production card, produced by Respondent and introduced in evidence, shows the entry of 474. Mills testified, however, that he had entered the figures 174 on the card, and claimed that the entry had been altered after he had turned it in. In fact, Mills went so far as to acknowledge as his the figures 74 of the 474 presently appearing on the card, but claimed that the first figure 4 was not his.¹¹ Mills denied that at any time during the discharge incident he had acknowledged the full entry as his, and claimed, in fact, that despite his requests, the card was not produced for his inspection.

¹¹Indeed, Mills was apparently prepared to concede that the downstroke on the first figure 4 was his, but not the cross-stroke which converted the 1 to a 4. If such were the case, it would have obviated the necessity for erasures, which the General Counsel contended was evidence of subsequent alteration. Actually, to the inexpert eye (and no expert testimony was offered) both figure 4's appear identical. Mills' testimony concerning the figures was wholly unconvincing, aside from the fact that it was refuted by Respondent's witnesses as pointed out below.

Mills' testimony was overborne by Respondent's witnesses John Baker, Humig, and Ray Schmitt. Baker testified that he established the error in Mills' card by actual count and reported to Humig (who reported to Mann). Baker and Humig then confronted Mills with the card and called attention to the error. Mills at first claimed that he had painted the full 474, but Baker pointed out that that was impossible because only 434 had been received under requisition and that 259 remained unpainted. Mills then claimed that he had also painted a different kind of blade (No. 830), and Baker pointed out that Mills had also claimed credit for those. Mills then admitted that he "evidently" made a mistake. He made no claim that he had entered only 174 on the card, but acknowledged to the contrary that the handwriting on the card was his.

Mann and Schmitt had joined the group during the latter part of the conversation. Mann informed Mills that he was discharged, and Schmitt, the guard, accompanied Mills while he picked up his belongings and left the plant.¹²

Mills also denied that he had ever been warned about "fattening the count" on his card, but here again his testimony was overborne by that of Respondent's witnesses. Thus, Humig and Harvey Lawrence testified to numerous occasions when Humig had warned the employees against fattening their counts, and Humig and Baker testified that reference was made to those warn-

ings during the discharge incident. Humig also
37 testified that he had discharged two other em-
ployees (Frank May and Bob Brown) for similar offenses in previous years; and there was evidence also that other employees (Hubert Frost and Harvey Lawrence) had been reprimanded.

As direct evidence of discriminatory intent, however, the General Counsel offered the testimony of Estel Frost that approximately two weeks before Mills' discharge, he overheard a conversation between Humig and Baker in which Humig said, "We will have to get rid of Mills. He's getting too many Union cards out." Humig

¹² Schmitt's testimony refuted Mills' claim that he had a further conversation with Mann in Mann's office, during which Mann again refused to show Mills the card.

and Baker flatly denied the incident. Frost's uncorroborated testimony cannot be credited over those denials, particularly in view of certain incredible aspects which developed during his examination, as follows: The incident allegedly occurred in the rest room. Frost was only a foot from Humig and Baker, and they were facing him. There were some 25 other persons in the rest room at the time.

The convincing refutation of the testimony of Mills and Frost left the General Counsel's case without substantial foundation. It is, therefore, found on the entire evidence that Respondent's discharge of Mills was not motivated by his Union membership and activities as alleged.

D. Assistance and support to the Employee Committee

It was only natural that, following the election and the defeat of the Union, the "Loyalty Group," which theretofore had constituted an informal group under the leadership of its steering committee, might have considered formalizing an organization to deal with the Company. It was more natural that they should do so in view of the suggestion which the Company had planted in its election propaganda that the employees form just such an inside organization. Thus, on August 9, Corbett had written

the employees a personal letter in which he stressed
38 his readiness to listen to their complaints, urged the employees to come to him in person instead of going to outsiders, and suggested that "We can have our own Grievance Committees, if you want to—and settle our own quarrels without outsiders interfering." Respondent followed up and emphasized that suggestion on August 17, with the following paragraph in its bulletin of that date to the employees:

Everyone knows that any time our employees want to form a Grievance Committee to hear complaints—they should choose their own Committees. A few weeks ago—when the employees in Shipping and Packing Departments signed a petition that they needed a water fountain—they got that fountain in *one day!* That's the way we listen to our employees at NuTone.

It was also natural that the leaders of the Loyalty Group should have led, as they did, the movement to form the inside organization. Thus, the evidence shows that the same four employees (Cloyd Vaught, John Daum, Arlene Lindley, and Juanita Griffith) constituted the steering committee, first for the Loyalty Group, and then for the Temporary Committee, the latter of which, as early as September 15, began, with the open assistance and support of the Company, a campaign for a formal permanent organization. On September 22, the steering committee made an announcement to the employees, the following paragraphs of which disclosed the significant nature and functions of the permanent organization and the steps by which it was to be brought into being:

All NuTone employees will be interested to know that an announcement will soon be made about each department electing people to an Employee Committee —to meet with the company and discuss problems which will help both the employees and the company. A temporary Committee was formed for the purpose of getting this plan started. The following is a report of what has happened so far.

On September 15, 1953, at 2:00 P.M., your Steering Committee, consisting of John Daum, Arlene Lindley, Juanita Griffith and Whitey Vaught, contacted Henry Mann and requested that the company meet with the Employee-Company Relations Committee and discuss things of mutual interest. Our purpose being to promote better understanding and cooperation between the company and the employees. Mr. Mann promised to convey our request to Mr. Corbett and secure a reply. When contacted, Mr. Corbett agreed to meet our Departmental Committee in his office at 3:30 P.M., Wednesday, September 16th 1953. On that date your Temporary Committee met with Mr. Corbett, Mr. Bladh and Mr. Mann, and the following statement was submitted and read by the Committee:

"This Committee was formed for the express purpose of improving the relations between the Company and its employees. We feel the need for

some method to be arranged, whereby the employees and Company alike will sit down with willingness and sincerity on both sides to seek a fair solution to our mutual problems. At that time everyone may feel free to express his views and cooperate in a manner to make NuTone not only a good place to work,—but the best place to work in Cincinnati.

"This first temporary committee was picked at random throughout the plant and a meeting was called. At the meeting it was decided to seek the cooperation of the Company. It is agreeable to the Company:

1. We would like some arrangements made for holding free democratic elections in every department, so that the employees may choose their own representatives by majority vote.
- 40 2. Some procedure set-up pertaining to meetings with the Company representative and the duly elected chairman and representatives from each department."

The Company agreed with this movement and stated it was a step in the right direction, which would result in better relations between NuTone and NuToners. It was also learned at the time that the Company has a few gripes of its own, which they would like to present to the duly elected committee and secure the cooperation of the employees.

Henry Mann advised that he is available to meet with the Temporary Committee at any time after they decide what plans can be made for holding a free election and then the time and place can be arranged so that it will be satisfactory to the Temporary Committee and the Company.

John Daum, a member of the steering committee, testified that the permanent committee was elected with the intention of taking employee grievances to Mann and—by his affidavit received without objection, as past recollection recorded—of discussing with Mann wages, working conditions, and incentive standards. Daum testified, however, that the permanent committee never got so far

as actually to discuss with Mann wages or incentive standards, but only "grievances or things that we didn't think were fair."

Mann did not deny the accuracy of any of the statements contained in the notice to the employees quoted above, and he admitted that he and Corbett had held discussions with the Temporary Committee along the lines stated in it, including Company "gripes," though he testified that that term was not specifically used during the discussions. Mann also admitted that he mimeographed the notice at the Committee's request, using

Company paper and equipment; that he had it distributed throughout the plant in the usual manner

which the Company used to distribute its own literature; and that no charge was made by the Company for any portion of its costs or services. The distribution occurred in part on Company time and was made both by foremen and employees.

Similarly, the Company mimeographed and distributed for the Temporary Committee a second bulletin, which referred to plans to elect a *permanent* Employee-Company Relations Committee, which contained instructions concerning the election, which informed the employees that the votes would be counted by the foremen, and to which was appended the ballot to be used. Again, the bulletin and the ballot were distributed at least in part on Company time, and in some instances the actual balloting (which took place on September 30) occurred on Company time. Furthermore, as stated in the bulletin, Respondent's foremen actually counted the ballots.

A third bulletin, dated October 1, by which the Temporary Committee announced the results of the election, was again mimeographed by the Company and distributed by it under the same conditions as the former ones.

After the election, the permanent Employee Committee met from time to time in the Company cafeteria to conduct its affairs; the meetings were held at least in part on Company time, for which the employees were paid.

Mann also met with the full committee of 26 members, on Company time, on several occasions between October 1 and Christmas. He testified that at the first meeting, at which Corbett was also present, Corbett spoke about the new

bus shelter which was being constructed for the comfort of the employees, and that although Corbett did not mention "gripes" as such, he discussed the Company's problems concerning quality and price in connection with meeting competition. Mann admitted that Ira Rose, a member of the Committee, suggested forming a credit union, but testified that there was no discussion of that proposal, and that Willie Fore brought up the subject of a couple of exhaust fans which were not functioning properly and which should be fixed. Mann testified that though the matter was not discussed, he made a note of Fore's complaint and referred it to the maintenance foreman, who repaired the fans.

Mann also testified that there were at least two meetings with the Committee concerning the Community Chest drive, in which the Committee participated at Mann's request, and during which the employees solicited contributions, issued receipts, and distributed and collected pledge cards. There were also some 3 or 4 meetings concerning arrangements for the employees' Christmas dance and at least 1 meeting in which Mann requested the Committee to assist in putting on the Company's Christmas party for children.

It is unnecessary to discuss or to analyze the foregoing evidence, since the mere recital of it establishes plainly (1) that the Employee Committee was a labor organization within the meaning of the Act, *N. L. R. B. v. General Shoe Corporation*, 192 F. 2d 504, 507 (CA 6); *N.L.R.B. v. Sharples Chemical Co.*, 209 F. 2d 645, 651-2 (CA 6), enf'dg. 100 NLRB 20; *N. L. R. B. v. Oliver Machinery Co.*, 210 F. 2d 946, 947 (CA 6), enf'dg, 102 NLRB 822; *P. R. Mallory Co., Inc.*, 107 NLRB No. 103; *Essex Wire etc., Co.*, 107 NLRB No. 250; *Poe Machine & Eng. Co.*, 107 NLRB No. 287; *Ed Taussig, Inc.*, 108 NLRB No. 82; and (2) that Respondent interfered with its formation and administration and gave it assistance and support. *Ibid.*; and see *Harrison Sheet Steel Co. v. NLRB*, 194 F. 2d 407, 410 (CA 7); enf'dg. 94 NLRB 81; *N. L. R. B. v. Russell Mfg. Co.*, 187 F. 2d 296, 297 (CA 5), enf'dg 82 NLRB 1081 (rehearing on other grounds, 191 F. 2d 358); *Ephraim Haspel*, 109 NLRB No. 8, 34 NRRM 1280.

43 It is immaterial, under the foregoing authorities, that Respondent and the Committee entered into no contract, or that they did not get to the point of actually bargaining about wages and hours; the purposes of the Committee were fully disclosed by the notices to the employees and by Daum's testimony. Those purposes were recognized and acted upon to the extent that grievances and other proposals concerning working conditions were presented on the one side and employer complaints on the other. That negotiations did not go further may well have been due to the filing, on December 9, of an amended charge alleging Respondent's domination and support of the Committee.

Nor is it material that there is no evidence of Committee activity since Christmas, 1953. *Russell Mfg. Co.*, 82 NLRB 1081, 1085, end'd. 187 F.2d 296, *supra*; *Saxe-Glassman Shoe Corp.*, 97 NLRB No. 53; *Essex Wire etc., Co.*, *supra*. Its inactive status is not necessarily permanent, and the danger of continued assistance and support to it is obvious unless Respondent is restrained by an appropriate remedial order.

The evidence does not, however, establish domination of the Committee by Respondent. Apart from the counting of the ballots by the foremen, no representatives of management took any part in the meetings or activities of the Committee or attempted to influence its policies. *Ephraim Haspel, supra*; cf. *N.L.R.B. v. Wemyss, d/b/a Coca-Cola Bottling Company of Stockton*, 212 F.2d 465, 471 (CA 9) decided April 20, 1954. It will therefore be recommended that the complaint be dismissed, insofar as it alleges domination.

44 E. Respondent's defense to reinstatement

Respondent's answer, which made a general denial that Respondent had discriminated against Marshall and the Pucketts, also averred that it had refused them reinstatement "upon lawful grounds." During the presentation of its case, Respondent spelled out more specifically an affirmative defense as follows: That between August 1 and 19, Marshall and the Pucketts, while passing out Union literature outside the plant in company with Union organizers, "used such vile and intemperate language as

to destroy whatever rights to reinstatement they might have had at the time."

However, there was again no evidence which attributed to Della Puckett the use of any such language or which established that she was present at any time when it was used by others. The evidence showed that Virgie Marshall was the chief offender and that Charlottie Puckett was a minor one. It showed also that there was no concert among the girls as to such conduct; that they had separate stands, passing out literature at separate places around the plant property; and that they were not in the presence of each other (with one exception when Marshall and Charlottie were together) on the occasion of any of the incidents which Respondent's witnesses testified to. Ray Sowder was present and was distributing literature either with Marshall or Charlottie on some of the occasions.

At least 6 of Respondent's witnesses attributed to Marshall a variety of vile and obscene statements, as well as cursing and profanity. To set forth the exact language used would be neither rewarding or edifying; it will suffice to suggest its content in general and in relatively genteel terms. In brief, it can be said that in some instances Marshall was charged with profanity and abusive language of the same type which she had used during the layoff incident; that she also made indecent and obscene suggestions relating to biological and bodily functions; that on some occasions she applied the term, "brown noses," to certain employees, and that on others she made specific statements which spelled out explicitly all that the term implies. She also made statements directly attacking the virtue of the female employees generally and of Audrey Vaught in particular; in fact, the evidence indicates that Marshall reserved her prize comments for Audrey and her husband, Lloyd, who acted as one of the leaders of the NuToner group.

Marshall denied that she used most of the profanity and the obscenities attributed to her, and endeavored to justify the remainder on the ground of provocation. The evidence established plainly, however, that Marshall was the leader and the *provocateur*, and that with minor exceptions the NuToner group avoided retaliation in kind. Marshall admitted a number of the incidents about which Respond-

ent's witnesses testified, but gave them a more genteel tone. She admitted, for example, that she had told Mr. Corbett to kiss the girls good morning on an occasion on which Respondent's witnesses had attributed to her a more lurid and indecent suggestion. Rather oddly, Marshall denied that she had ever called any of the employees "brown noses," though she admitted that she had perhaps accused one or more of them more explicitly of acts implied by the term. She also admitted that she may have told Mary Jane Tierney (as Tierney testified) that she would lose her job if the Union got in.

Though the General Counsel offered limited corroboration of certain portions of Marshall's testimony, her own partial admissions again served to corroborate the testimony of Respondent's witnesses, which is credited.

Charlottie's conduct, in comparison, was much less flagrant. Lloyd Vaught testified that during an exchange which he had with Marshall, Charlottie had chimed in and called him an "ignorant s— o— b—." Rose DeAngelis (who had testified earlier and credibly as the General Counsel's witness) testified that Charlottie called her a vile name roughly synonymous with "brown nose," and that she retorted in kind.

Most of the evidence involving Charlottie concerned an exchange between her and Margaret Ball some two weeks prior to the election. The incident occurred when Ball and 3 or 4 companions, leaving the plant, passed Puckett and Ray Sowder on the way to Ball's car. An argument was provoked by Puckett's offer, and Ball's refusal, of Union literature and by Ball's chiding of Puckett for being out there in view of Mr. Corbett's good treatment of the employees; it ended by Puckett saying, "You g—d— s—'s don't know any better . . . You will get yours just the same as we did."

Only the use of the quoted statement is in substantial dispute. Ball's testimony that Puckett made it was corroborated by Ann Lukas and Hilda Nickel. Puckett denied making the statement. Sowder's testimony, offered in corroboration of that denial, is not persuasive. Thus, all other witnesses were agreed that the incident occurred in 2 segments, one before Ball got into her car, and one after she got out again to continue the argument. Sowder did

not recall the latter segment and heard nothing that was said during it. In fact, he testified that he was busy passing out literature at the time and was paying no particular attention, other than to note that the Ball group was passing by. Under the circumstances, Sowder's testimony affords no substantial corroboration for Puckett's denials, which are overborne by Ball's corroborated testimony.¹³ Puckett's denials of the Vaught and DeAngelis testimony are also not credited.

47 As indicated by the foregoing evidence, the election campaign had engendered between the opposing factions of employees the type of heated atmosphere which is frequently the concomitant of strike situations; and cases involving such situations furnish the closest analogies to the present case. Furthermore, the underlying question is the same, i.e., whether, while engaged in what constituted protected concerted activities, the employees had engaged in such flagrant acts of misconduct as to render them unsuitable for reemployment.

The Board and the Courts have frequently held that the use of vilifying and disparaging language by a striker on the picket line does not affect his right to reinstatement. See, e.g., *N.L.R.B. v. Deena Artware, Inc.*, 198 F. 2d 645, 652 (CA 6), cert. den., 345 U. S. 906, enf'ding as mod., 86 NLRB 732 and 95 NLRB 9; *Kansas Milling Co. v. N.L.R.B.*, 185 F. 2d 413, 420, (CA 10), enf'ding. as mod., 86 NLRB 925, 928. Thus, while the Board does not condone the use of profane and abusive language, it has recognized that in the realities of industrial life, particularly where vital issues are at stake during a strike or an organizing campaign, employees frequently express their sentiments in crude and vulgar language, not suited either to the pleasantries of the drawing room or to the courtesies of parliamentary disputation. Cf. *Longview Furniture Co.*, 100 NLRB 301, 304, mod. and enf'dd., 206 F. 2d 274, (CA 4), decided July 27, 1953.

The *Longview* case may ultimately go far toward resolving the question in the present case. However, the

¹³ Lukas also testified that on some different occasion Ball and Puckett engaged in an argument about the latter's vacation pay, during which Puckett had cursed Corbett. Puckett denied that testimony. As Ball's testimony contained no corroboration of Lukas', Puckett's denial is credited.

present finding must be made without the benefit of the Board's determination of the question which the court remanded to it in that case, concerning whether a group of strikers had banded together in hurling profane, obscene, and insulting epithets at non-striking employees who were attempting to work. The Court
 48 directed the Board to determine which of the strikers should be denied reinstatement under the principles set forth in its decision, stated in part as follows:

From the standpoint of discharge or reinstatement there is no difference in principle between engaging in acts of violence and using profane and insulting language towards fellow employees in an effort to drive them from work.

. . . . We think it equally clear that the act does not protect them in using insulting and profane language calculated and intended to publicly humiliate and degrade employees who are attempting to work in an effort to prevent them from working. They are no more privileged to infringe upon the rights of fellow employees than upon the rights of the employer.

However, the Board has recently indicated its views in a somewhat analogous situation, though different in the respect (as here) that there was no concert or banding together to utter the opprobrious language. Thus, in *Efco Mfg. Co., Inc.*, 108 NLRB No. 52, 33 LRRM 1516, 1518, decided April 15, 1954, the Board drew the line between the following two cases, ordering reinstatement in the first one and denying it in the second: (a) The striker called a non-striker a "wop-bastard," challenged a company official to a fist fight as a means of settling the strike, and called him "yellow" when he failed to accept the challenge. (b) The striker ascribed to a non-striker the capability of committing an act so foul as to be unmentionable.

Those criteria may properly be applied to the present case, as representing the latest views of the Board (though they do not, of course, constitute a precise or complete standard covering the full field of misconduct via profane and indecent language). When applied, they plainly
 49 dictate the rejection of Respondent's defense as to

both of the Pucketts. Thus, Della used no objectionable language and was not present when any was used. Charlottie's language, though not suited to the pleasantries of the drawing room, paralleled the language used in case (a), *supra*.

Marshall's case is more difficult of determination; her language fell somewhere between that given in the two *Efco* examples. However, the extent and the character of her utterances was such that the latter standard seems obviously more suitable than the first; and it is, therefore found that the remedy of reinstatement should be denied as to her.¹⁴

Though the usual remedy of reinstatement and back pay will be recommended for the Pucketts,¹⁵ there still remains a question as to the framing of a proper order

to remedy Respondent's unfair labor practice
50 regarding Marshall. Obviously, except for Respond-

ent's discrimination against her, she would have been recalled on June 23, 1953, and would have been employed certainly until the time of her misconduct, the most flagrant of which occurred immediately prior to the election. It will, therefore, be recommended that Respondent make Marshall whole, in the usual manner, for any loss of pay she may have suffered from June 23, through August 18, 1953, inclusive.

Upon the basis of the foregoing findings of fact and upon the entire record in the case, the undersigned makes the following:

¹⁴ There is the added circumstance of Marshall's threat that Tierney would lose her job if the Union got in. The Board held in *Tennessee Coach Co.*, 84 NLRB 703 and in *Majestic Metal Specialties, Inc.*, 92 NLRB 1864, that such a statement, made by an employee as an individual and not as a Union agent, was within the realm of protected activity. Subsequent to those holdings, the *Tennessee Coach* case was denied enforcement, 191 F.2d 546 (CA 6); and the Board has apparently not since indicated whether it will acquiesce in the Court's view or will continue to adhere to its own. In any event, determination of the point is unnecessary here, since Marshall's other conduct has been found sufficiently flagrant as to warrant denial of reinstatement.

¹⁵ Respondent's letter of August 21 to Della Puckett cannot be found to be a valid offer of reinstatement in view of its misdirection and Respondent's failure to reinstate her on her application after Mann's attention was called to the error.

Conclusions of Law

1. Respondent's activities set forth in Section III, above, occurring in connection with Respondent's operations described in Section I, above, have a close, intimate, and substantial relation to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing the free flow thereof.
2. The Union and the Employee Committee are labor organizations within the meaning of Section 2.(5) of the Act.
3. By discriminating in regard to the hire and tenure of employment of Virgie Marshall, Charlotte Puckett, and Della Puckett, thereby discouraging membership in the Union, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a) (3) and (1) of the Act.
4. By assisting, contributing support to, and interfering with the formation and administration of the Employee Committee, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a) (2) and (1) of the Act.
5. By interfering with, restraining, and coercing its employees in the exercise of rights guaranteed in Section 7 of the Act, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a) (1) of the Act.
6. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2 (6) and (7) of the Act.

The remedy

It having been found that Respondent has engaged in unfair labor practices, it will be recommended that it cease and desist therefrom and that it take affirmative action designed to effectuate the policies of the Act.

RECOMMENDATIONS

Upon the basis of the above findings of fact and conclusions of law, it is recommended that Respondent, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

- (a) Discouraging membership in the Union, or in any other labor organization of its employees, by failing to recall them after layoff, or in any other manner discriminating in regard to their hire or tenure of employment or any term or condition of employment;
- (b) Assisting, contributing support to, or in any other manner interfering with, the formation and administration of NuTone Employee-Company Relations Committee, or any other labor organization of its employees, or recognizing said Committee as the representative of any of its employees for the purpose of dealing with them concerning grievances, labor disputes, wages, hours of work, or other conditions of employment unless and until said organization shall have been certified by the board;

52 (c) Interrogating its employees concerning their Union membership and activities, soliciting them to report on such activities, or informing them that a layoff was due to such activities; or discriminatorily applying its no-posting, no-solicitation, and no-distribution rules so as to hinder, restrain, and impede the Union's organizational efforts;

(d) In any other manner interfering with, restraining, or coercing its employees in the exercise of their right to self-organization, to form, join, or assist United Steelworkers of America, CIO, or any other labor organization, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any or all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in Section 8(a)(3) of the Act.¹⁶

2. Take the following affirmative action:

- (a) Offer to Charlottie Puckett and Della Puckett immediate and full reinstatement to their former or substantially equivalent positions, without prejudice to their seniority

¹⁶ See *Consolidated Industries, Inc.*, 108 NLRB No. 14, footnote 3.

and other rights and privileges, and make them whole in accordance with the Board's usual remedial policies (*Chase National Bank*, 65 NLRB 827; *Crossett Lumber Co.*, 8 NLRB 440; *F. W. Woolworth*, 90 NLRB 289) for any loss of pay they may have suffered since June 23, 1953, by reason of the discrimination against them;

(b) Make whole Virgie Marshall, in the manner prescribed in paragraph (a), *suprà*, for any loss of pay she may have suffered from June 23, to August 18, 1953, inclusive, by reason of the discrimination against her.

(c) Withdraw and withhold all recognition from Nutone Employee-Company Relations Committee as the representative of any of its employees for the purpose of dealing with them concerning grievances, labor disputes, wages, hours of work, or other conditions of employment, unless and until said organization shall have been certified by the Board;

(d) Post in its plant at Cincinnati, Ohio, copies of the notice attached hereto and marked Appendix A. Copies of said notice to be furnished by the Regional Director for the Ninth Region shall, after being signed by Respondent's representative, be posted by Respondent immediately upon receipt thereof and maintained by it for sixty (60) consecutive days thereafter in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material; and

(e) Notify the Regional Director for the Ninth Region, in writing, within twenty (20) days from the date of the receipt of this Intermediate Report and Recommended Order, what steps Respondent has taken to comply herewith.

It is further recommended that unless on or before twenty (20) days from the date of the receipt of this Intermediate Report and Recommended Order, Respondent notifies said Regional Director in writing that it will comply with the foregoing recommendations, the National Labor Relations Board issue an order requiring Respondent to take the action aforesaid.

It is further recommended that the complaint be dismissed insofar as it alleges violations of the Act other than those found herein.

Dated at Washington, D. C., this 30th day of July, 1954.

(Signed) GEORGE A. DOWNING
Trial Examiner

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Appendix A to Intermediate Report

NOTICE TO ALL EMPLOYEES

PURSUANT TO

**THE RECOMMENDATIONS OF A TRIAL
EXAMINER**

of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, we hereby notify our employees that:

WE WILL NOT discourage membership in the **UNITED STEELWORKERS OF AMERICA, CIO**, or in any other labor organization of our employees, by failing or refusing to recall them after layoff, or in any other manner discriminate in regard to their hire or tenure of employment or any term or condition of employment.

WE WILL NOT assist, contribute support to, or in any other manner interfere with the formation and administration of **NUTONE EMPLOYEE-COMPANY RELATIONS COMMITTEE**, or of any other labor organization of our employees, and we will not recognize said Committee as the representative of any of our employees for the purpose of dealing with us concerning grievances, labor disputes, wages, hours of employment, or other conditions of employment. **WE WILL NOT** Interrogate our employees concerning their union membership and activities, solicit them to report on such activities, or inform them that a layoff was due to such activities; and we will not discriminatorily apply our no-posting, no-solicitation, and no-distribution rules so as to hinder, restrain, and impede our employees in their organizational efforts.

WE WILL NOT in any other manner interfere with, restrain, or coerce our employees in the exercise of their right to self-organization, to form, join, or assist UNITED STEELWORKERS OF AMERICA, CIO, or any other labor organization, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any or all such activities, except to the extent that such right may be affected by an agreement requiring membership in a labor organization, as authorized in Section 8(a)(3) of the Act.

WE WILL offer to Charlotte Puckett and Della Puckett immediate and full reinstatement to their former or substantially equivalent positions, without prejudice to their seniority and other rights and privileges, and make them whole for any loss of pay they may have suffered by reason of our discrimination against them.

WE WILL make whole Virgie Marshall for any loss of pay she may have suffered from June 23 to August 18, 1953, inclusive, by reason of our discrimination against her.

WE WILL withdraw and withhold all recognition from NUTONE EMPLOYEE-COMPANY RELATIONS COMMITTEE as the representative of any of our employees for the purpose of dealing with them concerning grievances, labor disputes, wages, hours of work, or other conditions of employment, unless and until said organization shall have been certified as such representative by the National Labor Relations Board.

NUTONE, INCORPORATED
(Employer)

Dated By
(Representative) (Title)

This notice must remain posted for 60 days from the date hereof, and must not be altered, defaced, or covered by any other material.

57 BEFORE NATIONAL LABOR RELATIONS
BOARD

112 NLRB No. 143

D-9052

Cincinnati, Ohio

Decision and Order of NLRB—Filed June 13, 1955

On July 30, 1954, Trial Examiner George A. Downing issued his Intermediate Report in this case, finding that the Respondent had engaged in and was engaging in certain unfair labor practices and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the copy of the Intermediate Report attached hereto. The Trial Examiner also found that the Respondent had not engaged in certain other alleged unfair labor practices and recommended dismissal of these allegations of the complaint. Thereafter the Respondent and the General Counsel filed exceptions to the Intermediate Report and supporting briefs.

The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Intermediate Report, the exceptions and briefs, and the entire record in the case, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner with the following additions and modification.

1. The Respondent contends that the evidence is not conclusive as to its knowledge of the Union activity of Charlottie Puckett and Della Puckett. It urges that 58 there is no direct and specific testimony that DeAngelis reported Marshall's statement that Charlottie Puckett and Della Puckett had signed union cards to supervisor Millichamp. The record discloses that Marshall, who is credited in this respect by the Trial Examiner, told DeAngelis that she and the Pucketts had signed union cards and that DeAngelis testified that she told Millichamp everything that Marshall had said on June 9. The finding that the Respondent had knowledge of the Pucketts' union activity, however, is not based solely upon this evidence. On June 9, when they were laid off, the three employees went together to Mann, the Respondent's director of indus-

trial relations, and registered complaints in a group, with Marshall as the main spokesman. They apparently were the only employees laid-off that day who went to Mann's office. On June 10 DeAngelis reported to Millichamp, and on June 11 the Union made its first distribution of literature at the plant. Marshall's participation was immediately reported to Millichamp. Thereafter the Respondent made its decision to get rid of, not only Marshall, but also the Pucketts. Accordingly their records were changed sometime after June 12 to show that they were not eligible for recall, and, as detailed by the Trial Examiner, the 3 employees were never informed, despite several contacts between the Respondent and the 3 employees, that the decision not to recall them had been made, but to the contrary, they were informed that they would be recalled. We agree with the Trial Examiner that the Respondent had knowledge of Union Activity, not only as to Marshall, but also as to the Pucketts with whom Marshall was associated.

59 We agree with the Trial Examiner that the Respondent's defense to the reinstatement of Della and Charlotte Puckett was properly rejected.¹

2. The Trial Examiner found that the Respondent violated Section 8(a) (2) and (1) of the Act by discriminatorily enforcing its own plant rules prohibiting posting, solicitation, and the distribution of literature.² He predicated a finding of unlawful conduct on his conclusion that the Respondent "broke its own rules . . . by campaigning against the Union in the normal arena, and the most effective one for reaching the employees, . . . while simultaneously denying access to it by the Union." We are in disagreement with this conclusion. Valid plant rules against solicitation and other forms of union activity do not control an employer's actions. Management prerogative certainly extends far enough so as to permit an employer to make rules that do not bind itself. Otherwise, an em-

¹ Nothing in the Board's decision on remand in Longview Furniture Company, 110 NLRB No. 246, (which the Trial Examiner notes was pending undetermined when the Intermediate Report issued) dictates a different result.

² The complaint does not allege that the rules in this case were themselves invalid, and there is no exception to the Trial Examiner's conclusion that the rules themselves were proper.

ployer can only enforce a rule he promulgates so long as he conducts himself according to the rule.

We fail to perceive any significant distinction between this situation and the facts presented in the Livingston Shirt case.³ Here, like there, the employer's expressed arguments contained no threats, promises of benefits, or otherwise coercive statements. The very essence of Section 8(c) is that expressions of opinion cannot be unfair labor practices. This does not mean that the opinion must be devoid of any expression for or against a union. So long as there is nothing coercive in the opinion, in other words, so long as it remains an opinion, it is protected. To say, as does our dissenting colleague, that distribution of literature is not the same as oral presentation, and therefore that Section 8(c) is not applicable, is to 60 subvert the plain meaning of that section. Not only is the written word as much "speech" as oral expressions, but Section 8(c) itself specifically enumerates "written, printed, graphic or visual" expressions as coming within its purview.

We also reject as untenable the General Counsel's argument that the other unfair labor practices committed by the Respondent convert otherwise protected opinions and views into unfair labor practices. To the extent that the Respondent violated the Statute, as found herein, we shall issue an appropriate cease and desist Order. We see no warrant, however, to enjoin the Respondent from conduct which the law expressly protects, merely because it engaged in other acts which are unlawful and which it will be required to discontinue.

Accordingly, we shall dismiss the allegations of the complaint that the Respondent discriminatorily enforced its valid no-solicitation rules.

3. We agree with the Trial Examiner's finding that the Employee-Company Relations Committee is a labor organization within the meaning of the Act⁴ and that the Re-

³ 107 NLRB 400.

⁴ As the evidence establishes that the Committee was created for the purpose of dealing with the Respondent concerning, among other things, the wages and working conditions of all the Respondent's employees, this case is distinguish-

spondent interfered with its formation and gave it assistance and support in violation of Section 8(a) (2) and (1) of the Act. For the reasons given by the Trial Examiner, however, we find that the evidence does not support the allegation that the Respondent dominated the Committee.

61

Order

Upon the entire record in this case, and pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board orders that Nutone, Incorporated, Cincinnati, Ohio, its officers, agents successors, and assigns, shall:

1. Cease and desist from:

(a) Discouraging membership in the United Steelworkers of America, CIO, or in any other labor organization of its employees, by failing to recall them after layoff, or in any other manner discriminating in regard to their hire or tenure of employment or any term or condition of employment;

(b) Assisting, contributing support to, or in any other manner interfering with the formation and administration of Nutone Employee-Company Relations Committee, or any other labor organization of its employees, or recognizing said Committee or any successor thereto as the representative of any of its employees for the purpose of dealing with them concerning grievances, labor disputes, wages, hours of work, or other conditions of employment unless and until said organization shall have been certified by the Board;

(c) Interrogating its employees concerning their Union membership and activities, soliciting them to report on such activities, or informing them that a layoff was due to such activities;

(d) In any other manner interfering with, restraining, or coercing its employees in the exercise of their right to

able from *N.L.R.B. v. Associated Machines, Inc.*, 219 F. 2d 433 (C.A. 6). In the *Associated Machines* case, the Court held that a committee that existed for the sole purpose of discussing individual, as contrasted with collective, complaints, was not a labor organization within the meaning of the Act.

self-organization, to form, join, or assist United Steelworkers of America, CIO, or any other labor organization, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any or all such activities except to the extent, that such right may be
 62 affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in Section 8(a) (3) of the Act.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Offer to Charlottie Puckett and Della Puckett immediate and full reinstatement to their former or substantially equivalent positions, without prejudice to their seniority and other rights and privileges, and make them whole in accordance with the Board's usual remedial policies (*Chase National Bank*, 65 NLRB 827; *Crossett Lumber Co.*, 8 NLRB 440; *F. W. Woolworth*, 90 NLRB 289) for any loss of pay they may have suffered since June 23, 1953, by reason of the discrimination against them;

(b) Make whole Virgie Marshall, in the manner prescribed in paragraph (a), supra, for any loss of pay she may have suffered from June 23, to August 18, 1953, inclusive, by reason of the discrimination against her;

(c) Withdraw all recognition from Nutone Employee-Company Relations Committee as the representative of any of its employees for the purpose of dealing with them concerning grievances, labor disputes, wages, hours of work, or other conditions of employment unless and until said organization shall have been certified by the Board;

(d) Post in its plant at Cincinnati, Ohio, copies of the notice attached to the Intermediate Report marked Appendix A.⁵ Copies of said notice to be furnished by

⁵ In the caption of the notice the words "The Recommendations Of A Trial Examiner" shall be changed to "A Decision And Order" and the reference to the application of Respondent's rules will be deleted. If this Order is enforced by a decree of a United States Court of Appeals, there shall be substituted for the words "A Decision And Order" the words "A Decree Of The United States Court Of Appeals, Enforcing An Order."

63 the Regional Director for the Ninth Region shall, after being signed by Respondent's representative, be posted by Respondent immediately upon receipt thereof and maintained by it for sixty (60) consecutive days thereafter in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material; and

(e) Notify the Regional Director for the Ninth Region, in writing, within ten (10) days from the date of Order, what steps Respondent has taken to comply herewith.

IT IS FURTHER ORDERED That the complaint be, and it hereby is, dismissed insofar as it alleges violations of the Act other than those found in the Decision and in the Intermediate Report.

Dated, Washington, D. C. June 13, 1955

Guy Farmer, Chairman

Ivar H. Peterson, Member

Philip Ray Rodgers, Member

NATIONAL LABOR RELATIONS BOARD
(SEAL)

ABE MURDOCK, *Member*, concurring in part and dissenting in part:

I agree with my colleagues that the Respondent violated Section 8 (a) (1) by various acts of interference, restraint, and coercion. I also concur with their conclusions as to the Pucketts and Marshall. However, I cannot agree with their reversal of the Trial Examiner's finding of a violation with respect to the discriminatory application of the Respondent's rules regarding no-posting, no solicitation, and no-distribution of literature; nor with their conclusion that the Committee was not an employer-dominated organization.

64 My colleagues have reversed the Trial Examiner and, applying the decision in Livingston Shirt Corp., have found that the Respondent's discriminatory enforcement of its no-solicitation rules was not violative of the

Act. In *Livingston Shirt*, the majority reversed prior precedents and held that an employer's discriminatory application of a no-solicitation rule to deny a union's request to speak on company time and premises where the employer had made such a speech, was not an unfair labor practice. I dissented in that case and refer to my dissent for a detailed statement of my views on the necessity of equal treatment. Apart from my fundamental disagreement there, I note that the instant case is distinguishable in certain respects and it is not necessary to extend the doctrine of *Livingston Shirt* this far. That case involved discrimination in the matter of *speeches*. This case involves discrimination in distribution of literature. The majority in *Livingston Shirt* made much of the fact that the traditional place for a union's speeches is in the union hall while the plant is the logical place for the employer to speak. It cannot similarly be said that a plant is not a traditional place for a union to distribute literature. Where an employer chooses to ban the distribution of literature on company time and property, I do not believe the Act permits him to discriminate as he did here by breaking his own rules to distribute anti-union literature before the election or to aid the Committee after the election. I note that the majority claims that Section 8(c) protects such discrimination as they did in *Livingston Shirt*. They still ignore the fact that the Court of Appeals for the Second Circuit in *Bonwit-Teller* specifically affirmed the Board's rejection of the theory that discrimination is protected by Section 8(c), the Court stating in its decision, "neither Section 8(c) nor any issue of 'employer free speech' is involved."

I also note the distinction that in *Livingston Shirt* the respondent's violation of its own rule on solicitation stood alone. The Court of Appeals for the Sixth Circuit 65 in *N.L.R.B. v. F. W. Woolworth*, 214 F.2d 78, found worthy of notice the fact that in that case also the alleged violation stood alone. Quite the contrary is true in the present case. The Board has found that this Respondent has interrogated its employees as to union activities, has solicited them to report on those activities, has requested them to turn in the names of union adherents, and has promised them benefits for their espionage. It has

also been found that the Respondent discriminatorily refused to reinstate certain active union adherents. Furthermore, the Respondent, as found by the majority, has given illegal support and assistance to another labor organization.

In this surcharged atmosphere the Union was engaged in a struggle with an active anti-union group for the support of the Respondent's employees. That group later became the nucleus for the labor organization mentioned above. In this context the Respondent emphasized that it would tolerate no posting on company property, no solicitation on company time, and no distribution of literature on company property. It professed neutrality between the two competing groups of employees and stated that the rules would be applied to both factions. The Respondent, however, then, while enforcing the rules against the Union and ostensibly against the anti-union group, enlisted on the side of the anti-union group, and between June 11 and August 18, the eve of the election, distributed in the plant eight separate pieces of anti-union propaganda. At the same time, it was encouraging its employees to set up an inside organization. Moreover, the bulletin of August 17, which told the employees that they should set up their own committee, was distributed in the plant by the Respondent. To put the cap on the situation and remove any possible doubts as to its discriminatory motive, when the Union lost the election, the Respondent completely ignored the rules in illegally assisting, as found by the majority, the Employee-Company Relations Committee, using as a nucleus the former anti-union group.

66 Under these circumstances, I am inescapably led to the conclusion that the Respondent violated the Act by discriminatorily applying its no-solicitation rules, and I would affirm the Trial Examiner in this respect.

The Trial Examiner found that the Respondent interfered with the formation and administration of the Employee-Company Relations Committee and gave it unlawful support and assistance; the Board has adopted this finding, and I agree. The Trial Examiner, however, found that the Respondent had not dominated the organization, and the Board has also affirmed that conclusion, overrul-

ing the General Counsel's exception. With this, I do not agree. Plainly there is merit in the General Counsel's exception.

On August 9, 1953, Corbett, Respondent's president, in a letter to employees in which he stressed his readiness to deal with employees' complaints stated, "We can have our own Grievance Committees, if you want to—and settle our own quarrels without outsiders interfering." On August 17 in a bulletin to employees the Respondent stated, "Everyone knows that any time our employees want to form a Grievance Committee to hear complaints—they should choose their own Committees." On August 19 the Union lost a Board-conducted election. On September 22 the employees were informed by a "Temporary Factory Committee" that an announcement would be made later with respect to the election of members to the Committee by the employees in each department. On September 30 instructions on how to vote and the ballots were distributed, and the employees voted for someone in their respective departments to represent the departments on the Committee. The foreman passed out the ballots, received them back, and counted the votes. On October 1, the results of the election, listing the representative for each de-

partment, were announced by bulletin. These three bulletins and the ballot were mimeographed by the Respondent using its own paper and equipment and distributed throughout the plant in the usual manner which the Respondent used to distribute its own bulletins. These bulletins were distributed in part on Respondent's time, and, although the bulletin containing the ballot stated that the voting would take place during the rest period, in some instances the balloting took place on Respondent's time. No charge was made by the Respondent for its cost or services. The Respondent met with the Committee from time to time, at least in part on Respondent's time, for which the Committee members were paid.

These facts conclusively prove that the Employee-Company Relations Committee was a creature of the Respondent, so dominated by it as to be incapable of becoming a bona fide bargaining representative of the employee. At the outset it must be recognized that the Committee was an employee representation plan. Necessarily, there was

inherent in it the structural and other vices which the Board pointed out in detail in *Carpenter Steel Company*⁶ make such organizations employer dominated. The idea was initiated by the Respondent. Although taken up by an employee committee, the actual creation of the organization through election of representatives came about because Respondent's foremen passed out ballots and counted the votes. The employees had no opportunity to accept or reject such a bargaining representative—only to vote for a departmental representative. The bargaining representative was foisted on them by the Employer. No provision exists for meetings of members whereby employees may collectively instruct their representatives as to their desires, dissolve the plan, affiliate with another organization, or otherwise exercise the controls which members of an ordinary labor organization have over its existence and operation. As employees can only elect a representative of their own department, the employer can control the membership of the Committee by discharging a representative or transferring him to another department. The Committee, having no resources of its own, was financially dependent upon the Respondent. These factors combine to persuade me that the Employee-Company Relations Committee was so dominated by the Respondent and such an impediment to an expression of the free will of the employees that the Board should order it disestablished.

I note that the Board customarily finds domination and orders disestablishment under such circumstances. See, e.g. *Harrison Sheet Metal Company*, 94 NLRB 81, in which the Board made a finding of domination on similar facts which was specifically upheld by the Court of Appeals for the Seventh Circuit (194 F. 2d 407). The cases relied on by the Trial Examiner and the majority, Ephraim Haspel, 109 NLRB No. 8, and *N.L.R.B. v. Weymss, d/b/a Coca Cola Bottling Company of Stockton*, 212 F. 2d 465, are readily distinguishable as they did not involve employee representation plans but ordinary independent labor organizations. Also in both cases, unlike the instant case, the employees

⁶ 76 NLRB 670, 687-690.

had an opportunity to determine whether or not they wished to be represented by the "inside" labor organization and they made their choice.⁷ I further note that, so far as I am aware, this is the first time in the history of the Board that it has found that an employee representation plan which an employer has foisted on employees is not a *dominated* labor organization and failed to disestablish it. I can-

69 not accept such a departure from sound precedent.

I find this departure all the more difficult to understand in view of the fact that only last month this Board stated in a decision that the legislative history of the Act shows that employee representation plans typify the "employer dominated bodies" toward which the proscription in the Act against "employer domination and support of labor organizations" was directed.⁸

Dated, Washington; D. C., June 13, 1955.

Abe Murdock, Member

NATIONAL LABOR RELATIONS BOARD

⁷ I find the instant case a much stronger case for domination than the *Ephraim Haspel* case, but note that one of my majority colleagues dissented in that case from a refusal of a majority there to find domination.

⁸ *Northeastern Engineering, Inc.*, 112 NLRB No. 96:

. . . as the legislative history of the Act shows, . . . the term "labor organization" was designedly used "very broadly" to embrace groups which are not "labor organization" or "unions" as that term is popularly understood, such as loosely-formed "employee representation committees" or "plans." Yet these typified in large part the employer dominated bodies, called "company unions", which Congress viewed as hostile to the guarantees of Section 7 of the Act and with which it sought to cope through the proscription in the Act against employer domination and support of labor organization.

1

BEFORE THE NATIONAL LABOR
RELATIONS BOARD

NINTH REGION

Case No. 9-CA-704

In the Matter of:

NUTONE INCORPORATED

and

UNITED STEELWORKERS OF AMERICA, C.I.O.

Room 703, Federal Building,
Cincinnati, Ohio.

Transcript of Testimony—Monday, April 26, 1954

Pursuant to notice, the above-entitled matter came on for hearing at 10:00 o'clock, a.m.

BEFORE:

GEORGE A. DOWNING, Esq., Trial Examiner.

APPEARANCES:

E. DON WILSON, Esq., and
HARRY D. CAMPODONICO, Esq.,
1200 Ingalls Building,
Cincinnati, Ohio,
appearing on behalf of the General Counsel.

MALCOLM F. HALLIDAY, Esq.,
GEORGE R. CASSIDY, Esq.,
CHARLES A. ATWOOD, Esq.,
of Frost & Jacobs,
2300 Union Central Building,
Cincinnati, Ohio,
appearing on behalf of Nutone Incorporated, the Respondent.

MR. CHESTER A. MORGAN,
Staff Representative,
United Steelworkers of America, CIO,
806 Keith Building,
Cincinnati 2, Ohio,

appearing on behalf of United Steelworkers of America, CIO, the Charging Party.

* * * * *
67**Henry Mann**

a witness called by and on behalf of the General Counsel, being first duly sworn, was examined and testified as follows:

* * * * *
73 Direct Examination

Q. (By Mr. Wilson) Mr. Mann, will you please state your full name? A. Henry Mitchell Mann.

Q. Are you the Henry Mann who executed General Counsel's Exhibit 1-Q which I show to you, being the Answer of Respondent? A. Well, this is not my signature.

Mr. Wilson: May I see the original, please, Mr. Trial Examiner?

Trial Examiner: Will you look at the original and see if that is your signature?

(Document handed to witness.)

The Witness: Yes, that is my signature.

Q. (By Mr. Wilson) You are the director of industrial relations for NuTone? A. Yes, sir.

Q. Approximately when did you commence your duties as director of industrial relations for NuTone?
74 A. November 1, 1952.

* * * * *
146 Direct Examination (Resumed)

193 Q. All right. You have directed representatives of the employee Relations Committee to solicit funds for the Community Chest at the plant during working time, have you not?

* * * * *
The Witness: I asked them to solicit for the Community Chest, which they said they would, and did.

Q. (By Mr. Wilson) And that was in October of 1953?
A. Whenever the Community Chest drive was on.

Q. You recall it was sometime last Fall? A. Last Fall, yes, sir.

* * * * *

194 Trial Examiner: You didn't discriminate against the Red Cross, did you?

The Witness: No, sir. We put publicity up on our bulletin board for the Red Cross, urging people to give, and I understand the company made a gift to the Red Cross.

Q. (By Mr. Wilson) Do you recall that approximately two days after you laid off the Marshall girl and the two Pucketts, the United Steelworkers, CIO, distributed literature at the plant? A. Yes, I believe it was about that time.

Q. About June 11? A. Yes.

* * * * *

195 Q. (By Mr. Wilson) Did you permit employees of NuTone to solicit memberships in the CIO Steelworkers? A. We did not prohibit them.

Q. Have you reprimanded employees about soliciting memberships in the Steelworkers? A. No, sir, I have not.

Q. To your knowledge, have any supervisors reprimanded employees for soliciting membership in the Steelworkers, at any time? A. If they did it was for solicitation on company time, not on employees' time.

Q. Well, then did you prohibit employees from soliciting membership in Steelworkers on Company time? A. On Company working time? They were asked not to.

Q. Was it simply a request? A. Well, a notice was put up to that effect.

* * * * *

197 Trial Examiner: Well, during your solicitation rule, did you forbid such solicitation during rest periods?

The Witness: No, sir.

* * * * *

198 Q. (By Mr. Wilson) Well, to your knowledge, or did you ever hear that a number of employees had been warned about soliciting and that there have been reprimands, has that ever come to your attention in any way? A. Yes, I understand that such reprimands were made on working time, but for doing that on working time.

Q. And did you also understand that a number of employees have been warned about soliciting? A. Well, that would go hand in hand with the reprimand, that is, it was not a reprimand, it was a warning, they were just told not to do that, as I understand it. I didn't do it.

Q. Do you recall that there was a so-called loyalty group of employees also known as NuToners for NuTone, who campaigned against the Union prior to the election on August 19, 1953? A. I understand there was.

199 Q. Do you recall that during the campaign immediately before the election, a girl employee passed around a cup, soliciting funds for the so-called loyalty group? A. I understand that a girl was reprimanded by her foreman for having done that.

200 Q. (By Mr. Wilson) My question is this, though: You do know and you knew, did you not, that the foremen did stop Steelworkers adherents from passing out buttons and membership cards on company time? A. Both groups, they stopped both groups from working time as distinguished against the rest periods. The foremen were told that the rest periods were employees' time.

201 Q. Well, the company itself posted signs on company property, did it not? A. Yes, sir.

Q. And you have seen signs, for example, for the Community Chest, or for the Cancer Fund or for the Heart Foundation, etcetera, on company property, have you not? A. Yes, sir.

202 Q. (By Mr. Wilson) I show you General Counsel's Exhibit 6 for identification, and ask you if General Counsel's Exhibit 6 for identification was posted on Company property throughout the plant on or about August 5, 1953?

Offers in Evidence

Mr. Wilson: I offer General Counsel's Exhibit 6 for identification in evidence.

203 Trial Examiner: Any objection?

Mr. Atwood: None.

Trial Examiner: It will be received.

Q. (By Mr. Wilson) I show you General Counsel's Exhibit 7 for identification. When you conclude reading it will you let me know? A. Yes, sir, I have read it.

Q. Is it a fact that General Counsel's Exhibit 7 for identification was posted on or about, and around Company property, on August 10, 1953? A. Yes.

Trial Examiner: What do you mean, throughout the plant, Mr. Witness?

The Witness: These were given to the foremen with instructions to post them in their departments, and that was what I assumed that he meant by "throughout the plant".

204 Mr. Wilson: I offer General Counsel's Exhibit 7 for identification in evidence.

Trial Examiner: Any objection?

Mr. Atwood: None.

Trial Examiner: It will be received.

206 Q. Does the Company regularly, from time to time, distribute literature on Company property? A. Yes.

Q. From time to time the NuTone Employee Relations Committee has distributed literature on Company property, has it not? A. They did distribute some last fall, I believe.

Q. Well, you know, do you not, that the Company, in behalf of the NuTone Employee Relations Committee, had literature distributed for such Committee for the purposes of having an election conducted so that the NuTone Employee Relations Committee could have its committee elected? A. Yes.

Q. And that literature was distributed on Company time? A. Yes.

Q. And it was collected on Company time, that is, the ballots? A. They were instructed to pass them out at the break and collect them at the break.

Q. But you know, do you not, that the literature was distributed before the break? A. Yes. I don't know that it was distributed before the break. The instructions were to distribute it on the rest period and collect it on the rest period.

Q. In any event you also know, do you not, that 207 various of your foremen counted, or participated in the counting of the ballots for the election of the representatives of the NuTone Employee Relations Committee, or whatever it is? A. Yes.

Trial Examiner: Who prepared the literature that was distributed?

The Witness: This Employee Relations Committee, this group.

Trial Examined: In what form was it, typewritten, printed, mimeographed?

The Witness: Mimeographed.

Trial Examiner: Where was it mimeographed?

The Witness: It was mimeographed by the Company, or, that is, on Company equipment.

Trial Examiner: All right.

Q. (By Mr. Wilson). And the Company supplied the paper? A. Yes.

Q. And of course the Committee was not charged for the paper or for the mimeographing? A. No.

208 The Witness: That was in the fall of the year, sir.

Q. (By Mr. Wilson) I show you, sir, what I have had marked as General Counsel's Exhibit No. 8 for identification, and ask you to look at it and let me know when you have finished. A. All right.

Q. Can you tell us, sir, if General Counsel's Exhibit 8 for identification was prepared by the Company and passed out and distributed on Company property, and also posted on the walls and various other places so that it would come to the attention of the employees at NuTone, on or about August 12, 1953? A. That was given to the foremen with instructions to post it, about that date.

Mr. Atwood: May I see that, please?

209 Mr. Wilson: Surely (handed to Mr. Atwood.)

Q. (By Mr. Wilson) And to your knowledge General Counsel's Exhibit No. 8 for identification was posted on or about that date; is that right? A. Yes.

Mr. Wilson: I offer General Counsel's Exhibit 8 for identification in evidence.

Trial Examiner: Any objection?

Mr. Atwood: None.

Trial Examiner: It will be received.

(The document heretofore marked General Counsel's Exhibit No. 8 for identification was received in evidence.)

210 Q. (By Mr. Wilson) Without respect, now, to whether there at one time was more of that or not, did you at least prepare the memorandum which it attached to that larger sheet, the memorandum going, "A great decision will soon be made by you"? A. Yes.

Q. And, again, without respect to whether the attachment to General Counsel's Exhibit 9 is complete or not, did you see to it that that was distributed throughout the plant? A. I believe this was mailed, sir.

211 Mr. Wilson: May we have a stipulation for the sake of the record that the election was held, the National Labor Relations Board election was held August 19, 1953?

Mr. Atwood: May we at the same time stipulate that the petition for an election was filed July 16th?

Mr. Wilson: Subject to a check—and I don't question the accuracy of the statement—I so stipulate.

Mr. Atwood: It is so stipulated.

Trial Examiner: It is stipulated, then, that the petition was filed on July 16th, and the election held on August 19th, is that correct?

Mr. Atwood: That's correct.

213 Q. (By Mr. Wilson) I show you General Counsel's Exhibit 10 for identification, and I ask you if that was distributed by the Employer at NuTone prior to the election? A. No, sir, that was mailed.

Q. To all employees? A. (Nods.)

Q. The answer is yes? A. Yes, sir.

214 Q. And approximately when? A. It would be difficult for me to give you the exact date, sir. It was several days before the election.

Trial Examiner: We will take a five-minute recess.

(Short recess.)

Trial Examiner: The hearing will be in order.

(Documents were thereupon marked General Counsel's Exhibit No. 11-A through 11-H for identification.)

Mr. Wilson: I propose a stipulation that General Counsel's Exhibit 11-A for identification was distributed by being passed out to employees at NuTone on or about August 17, 1953, and that it was distributed by the Employer to the employees.

Mr. Atwood: All right.

Trial Examiner: The stipulation will be received.

Mr. Wilson: I propose a stipulation that General Counsel's Exhibit 11-B for identification was distributed by being passed out to employees at NuTone by the Employer, NuTone, on or about August 18, 1953.

The Witness: That August 18th, I couldn't agree with that.

Trial Examiner: Just a moment, now. Let's reach a stipulation off the record, gentlemen, if we are going to have one.

Mr. Wilson: May we be off the record?

Trial Examiner: Yes.

(Discussion off the record.)

215 Trial Examiner: On the record.

Mr. Atwood: The Respondent will so stipulate.

Trial Examiner: We have a stipulation on 11-A and B, right? —The stipulation will be received.

Mr. Wilson: May I check to make sure that we have the date in that stipulation, sir?

Trial Examiner: August 18th.

Mr. Wilson: Thank you, sir.

I propose a stipulation that General Counsel's Exhibit 11-C for identification was distributed by the Employer to

the NuTone employees by being passed out on or about July 27, 1953.

Mr. Atwood: It is so stipulated.

Trial Examiner: "Passed out," that's a little indefinite.

Mr. Wilson: By pass out, General Counsel has meant when he's used that phrase in the proposed stipulation, and the accepted ones, that the literature was physically handed to employees in the plant by supervisory personnel.

Trial Examiner: Is that acceptable?

Mr. Atwood: Yes.

Trial Examiner: The stipulation will be received.

Mr. Wilson: And we mean particularly also that by being passed out, passed out as distinguished from being mailed.

Mr. Atwood: That's satisfactory.

Trial Examiner: All right.

Mr. Wilson: I propose a stipulation that General
216 Counsel's Exhibit 11-D for identification was distributed by being passed out to NuTone employees by NuTone on or about July 31, 1953.

Trial Examiner: Passed out where?

Mr. Wilson: At the plant. It is further a part of all stipulations so far proposed by me, or which I now propose, that—I propose as a part of that—that such passing out and distribution took place at the plant on Company property.

Mr. Atwood: Correct.

Trial Examiner: The stipulation will be received.

Mr. Wilson: I don't know whether I completed the stipulation, proposed stipulation, with respect to 11-D.

Trial Examiner: I think so. July 31st?

Mr. Wilson: Yes; all right.

I propose a stipulation that General Counsel's Exhibit 11-E for identification was passed out by the Employer to NuTone employees on Company property on or about June 23, 1953.

Mr. Atwood: It is so stipulated.

Trial Examiner: The stipulation will be received.

Mr. Wilson: I propose a stipulation that General Counsel's Exhibit 11-F for identification was distributed by being passed out to employees on Company property by NuTone, on or about June 12, 1953.

Mr. Atwood: It is so stipulated.

Trial Examiner: The stipulation will be received.

Mr. Wilson: I propose a stipulation that General
217 Counsel's Exhibit 11-G for identification was dis-
tributed by being passed out to employees on Com-
pany property by the Employer on or about—

May we be off the record for a moment, sir?

Trial Examiner: Yes.

(Discussion off the record.)

Trial Examiner: On the record.

Mr. Wilson: On or about approximately one week prior
to August 19, 1953.

Mr. Atwood: It is so stipulated.

Trial Examiner: The stipulation will be received.

Mr. Wilson: I propose a stipulation that General Coun-
sel's Exhibit 11-H for identification was distributed by the
Employer to NuTone employees by being passed out to
them on Company property on or about July 29, 1953.

Mr. Atwood: It is so stipulated.

Trial Examiner: The stipulation will be received.

218 Mr. Wilson: I offer in evidence General Coun-
sel's Exhibits 11-A through 11-H for identification.

Trial Examiner: Any objection?

Mr. Atwood: None.

Trial Examiner: It will be received.

219 Mr. Wilson: I propose a stipulation that General
Counsel's Exhibit 12-A for identification was mailed
by the Employer Respondent to NuTone employees, on or
about August 11, 1953.

Trial Examiner: Any objection?

Mr. Atwood: He was going to go through the whole set.

Trial Examiner: All right, go ahead; we will save time.

Mr. Wilson: It is part of the same proposal that General
Counsel's Exhibit 12-B for identification was mailed by
Respondent to NuTone employees on or about sometime
between June 12 and August 19, 1953.

220 That General Counsel's Exhibit 12-C for identi-
fication was mailed to NuTone employees by Re-

spondent NuTone on or about in the very latter part of July, 1953.

That General Counsel's Exhibit 12-D for identification was mailed to NuTone employees by the Respondent NuTone on or about June 12, on or about or during the period extending from June 12, 1953, to August 19, 1953.

That General Counsel's Exhibit 12-e for identification was mailed by the Respondent to NuTone employees on or about June 12, 1953.

And that General Counsel's Exhibit 12-F for identification was mailed to NuTone employees by the Respondent on or about August 2, 1953.

That General Counsel's Exhibit 12-G for identification was distributed by the Respondent by mail to NuTone employees on or about August 13, 1953, it being understood that both General Counsel's Exhibit 12-G for identification and 12-F for identification when mailed were mailed from the home of the president, J. Ralph Corbett.

That General Counsel's Exhibit No. 12-H, which consists of one single sheet, yellow in color, and to which are attached two letters, was mailed by the Respondent to its employees on or about August 12, 1953.

And that General Counsel's Exhibit 12-I for identification was mailed by the Respondent to the NuTone employees on or about the latter part of July, 1953.

Do you so stipulate?

Mr. Atwood: I will so stipulate.

Trial Examiner: The present stipulation relates to Exhibits 12-A through 12-I, inclusive?

Mr. Wilson: Yes, sir.

Trial Examiner: The stipulation will be received.

Mr. Wilson: I offer General Counsel's Exhibits 12-A through I for identification in evidence.

Trial Examiner: Any objection?

Mr. Atwood: None.

Trial Examiner: They will be received.

224 Mr. Wilson: I propose a stipulation that General Counsel's Exhibit 13 for identification was mailed by the Respondent to its employees from the home of the president, J. Ralph Corbett, on or about August 9, 1953.

Mr. Atwood: It is so stipulated.

Trial Examiner: The stipulation will be received.

Mr. Wilson: In connection with this exhibit, may I at this time call to the attention of the Trial Examiner the fourth paragraph, towards the last of it; or first may I offer General Counsel's Exhibit 13 for identification in evidence?

Trial Examiner: Any objection?

Mr. Atwood: None.

Trial Examiner: It will be received.

Mr. Wilson: That part of the paragraph which reads, "We can have our own grievance committee if you want to, and settle our own quarrels without outsiders interfering."

(The document heretofore marked General Counsel's Exhibit No. 13 for identification, was received in evidence.)

225 Mr. Wilson: I have marked for identification General Counsel's Exhibit 14-a.

Q. (By Mr. Wilson) You are familiar with that, are you not, Mr. Mann? A. Yes, sir, I have seen it.

Q. Earlier in your testimony you testified about literature which had been mimeographed by you, or NuTone, for the NuTone employee relations committee. Is General Counsel's Exhibit 14-A one of such pieces of literature? A. That we mimeographed?

Q. Yes. A. Yes, we mimeographed this for them, for this group of people.

Q. And you mimeographed that at the request of Mr. Vaught? A. At the request of this committee.

Q. And you caused General Counsel's Exhibit 14-A for identification to be distributed to the employees in the plant, did you not? A. Yes.

226 Q. And it was distributed in the usual way in which the Company distributes literature throughout the plant? A. I believe this was, yes.

Mr. Cassidy: May we have the exhibit identified?

Trial Examiner: What is the date of that?

Mr. Wilson: September 22, 1953.

Mr. Cassidy: Which is it?

Mr. Wilson: Oh, sure (document shown to counsel.)

Q. (By Mr. Wilson) And that was mimeographed by the Company and distributed as you have testified on or about September 22, 1953? A. Yes, sir.

Q. I realize you testified generally about this literature before, but I would like you to be specific with the permission of the Trial Examiner.

Nobody paid the Company for this work of mimeographing? A. No.

Q. And the Company supplied the paper, is that not so? A. Yes..

Q. You had a discussion with members of the committee about, or the temporary committee, about setting up such an organization as they desired to have, did you not, prior to the time that GC-14-A for identification was distributed? A. They informed us that they were going to, that they had set up such a committee.

227 Q. And they told you, did they not, that they wished to set up an employee relations committee to handle such grievances as might come up, and to work matters out with the Company? A. I don't think they said, used grievances, as I recall.

Q. What did they tell you they wanted to do? A. That they were going to set up an employee relations committee

* * * * *

Q. (By Mr. Wilson) And they told you, did they not, they wanted to set up an employee relations committee to deal with the Company, and thereby improve relationships between the Company and the employees? A. They said, to make, used the term, "Make NuTone a better place to work."

* * * * *

228 Q. (By Mr. Wilson) So that we can have the picture straight, first a temporary committee came and visited with you and told you that they wanted to form an employee relations committee and wanted to have the cooperation of management in setting up such an employee relations committee; is that not so? A. Well, they told us they were going to do that.

Q. All right; and they told—and, in fact, they told you that they would like to have you print some literature for

them? A. Not at that time. At a later time they requested that we print the literature for them.

Q. All right. And they told you they wanted to 229 have an election in the plant, did they not? A. Yes.

Q. And you told them you would do that, did you not? A. Told them that we would—they asked us to print the literature and distribute it for them, which we agreed to do.

Q. And they told you they wanted to have an election in the plant, did they not? A. Yes.

Q. For the purpose of having a permanent committee of the Employee Relations Committee elected and set up? A. An employee committee, yes.

Q. All right, now, 14-B for identification, NuTone printed or mimeographed General Counsel's Exhibit 14-B for identification at the request of this temporary committee, did they not? A. Yes.

Q. And again the paper was supplied by NuTone? A. Yes.

Q. And the mimeographing was done without charge by NuTone for this employee committee? A. Yes.

Q. And the ballots were distributed throughout the plant by—Withdraw that. The ballots were distributed throughout the plant in the same way that General Counsel's Exhibit 14-A for identification was distributed, namely the usual manner that the Company literature was distributed; is that correct? A. Yes.

Trial Examiner: Is 14-B a ballot?

Mr. Wilson: Yes, sir.

Trial Examiner: Is that correct, Mr. Witness?

The Witness: Yes, I would call it that, sir.

Q. (By Mr. Wilson) And General Counsel's Exhibit 14-C for identification, which I show you, was prepared by the Employer at the request of the elected NuTone Employees—NuTone Employer—Withdraw that. Forgive me, sir.

General Counsel's Exhibit 14-C for identification was prepared by the Company at the request of the elected NuTone Employee Relations Committee; is that not so? A. Is that not so, or is that so?

Q. Well, is it or not so? Is it so or is it not so? A. Well, it means something different, you understand.

Trial Examiner: Is it so?

The Witness: Yes.

Q. (By Mr. Wilson) And, again, the paper was supplied by management? A. Yes.

Q. And the mimeographing was done for this NuTone Employee Relations Committee free of charge; is that correct? A. Yes.

Q. And General Counsel's Exhibit 14-C for identification was distributed by NuTone in the same fashion as it 231 distributed General Counsel's Exhibit 14-A and B for identification? A. Essentially the same fashion.

Mr. Wilson: I offer General Counsel's Exhibits 14-A through C for identification in evidence.

* * * * *

Mr. Wilson: I withdraw that. I assume General Counsel's Exhibits 14-A through C have been received, have they not?

Trial Examiner: They have. I received them.

* * * * *

237 Q. Do you recall that when you and Mr. Corbett met with this group of about 30 for the first time that Mr. Corbett told this group of about 30 that they could meet with Mr. Mann, meaning you, from time to time, to take up their problems and that if necessary, they 238 could meet with him? A. He made a statement to the effect that they could meet with me and talk to me and that he would talk to them if they so desired.

* * * * *

241 Q. (By Mr. Wilson) Thereafter, or after the election, from time to time the NuTone Employee Relations Committee met in the company cafeteria to conduct its affairs, did it not? A. Did it? Yes.

Q. And those meetings were conducted at least partly from time to time— A. At least what?

Q. Partly, from time to time, on company time, is that not so?

* * * * *

242 The Witness: Yes.

Q. (By Mr. Wilson) And, of course, employees are paid as you have already testified to, for company time, is that not so? A. That is so.

Q. You have already testified, I believe, that you have met with this committee on some two or three occasions?
A. Yes.

Q. Can you be a little more specific and say whether it was two times or three times, or more than that? A. I can be specific as to three times, possibly four.

* * * * *

244 Q. All right, and when was the first one, about?

A. The first one was there, I suppose it was their first meeting and they had asked me and Mr. Corbett to come in on their meeting, which we did, I believe, well, one of the group did get up and say that this was their committee that had been elected, and asked Mr. Corbett if he had anything to say, and he did talk to them, he mentioned a new shelter house, bus shelter, that had been constructed or was being constructed for their comfort. He talked about quality of his products again. At that time, that is all I can remember.

Trial Examiner: Is that when he stated his gripes?

245 The Witness: Sir?

Trial Examiner: Is that when he stated his gripes?

The Witness: I don't recall him mentioning the word "gripes", sir. He did not, to my knowledge, mention gripes.

Trial Examiner: Was he complaining about the quality of the products?

The Witness: No, he was mentioning some of the problems we had with our competition, quality and price, meeting our competition.

Trial Examiner: All right.

Q. (By Mr. Wilson) Do you remember Ira Rose asking about forming a credit union? A. Yes.

Q. At what meeting was there a discussion between this NuTone Employee Relations Committee and management with respect to setting up a credit union? A. Ira Rose mentioned that in this meeting that I am speaking of. There was no discussion on it.

Q. The first meeting? A. Yes.

Q. Do you remember Willie Fore, do you remember him bringing up the subject of a couple of exhaust fans that didn't function properly? A. Yes.

Q. What was discussed about them that you can
246 recall? A. No discussion that I can recall.

Q. Well, you remember he pointed out that the committee had found there were a couple of exhaust fans that weren't working properly, and they would appreciate it if they would be put in shape? A. No, he didn't mention the committee found it, he mentioned that existed where he had been working.

Q. What did he want them to stay, not functioning properly or did he want them to function properly? A. He felt that they were not functioning properly, and should be made to function properly.

Q. And did you agree to make them function properly, or didn't you? A. No agreement was made.

Q. You just discussed it? A. No, no discussion was made. He mentioned it, I made a note of the fact that the fans were not functioning properly, and that's all.

Trial Examiner: Did you do anything about it?

The Witness: I didn't no. My—

Trial Examiner: Did you pass your note to someone to do something about it?

The Witness: Yes, to the maintenance foreman and then some individual complaints came in before they were finally repaired.

Q. (By Mr. Wilson) The fact is that you brought
247 it to the attention of a foreman who tried to get it fixed, is that right? A. The maintenance foreman.

Q. Maintenance foreman who tried to get it fixed, is that correct? A. Yes.

* * * * *

John Elmer Daum,

a witness called by and on behalf of the General Counsel, being first duly sworn, was examined and testified as follows:

Direct Examination

* * * * *

Q. (By Mr. Wilson) By whom are you employed? A. NuTone Incorporated.

Q. And for how long approximately have you been so employed? A. Approximately four years.

Q. Do you recall a National Labor Relations Board election that was held on August 19, 1953? A. The date I won't verify, but I do remember the election.

Q. Prior to that time were you familiar with a group of employees who referred to themselves as Nutoners for Nutone? A. Yes.

Q. Were you active on behalf of such group? A.
356 Yes.

Q. Could you tell us whether or not the Nutoners for Nutone were also sometimes known as the Loyalty group? A. Well, that's a little awkward to answer. I'll do it to the best of my ability. We started out as Nutoners for Nutone, lacking a better name, but it got to a place we called ourselves the Loyalty group.

Q. And prior to the election will you tell us whether or not the Nutoners for Nutone or Loyalty group actively campaigned against the Steelworkers? A. We campaigned against a union organization coming into our plant, yes.

Q. Would you say that you were one of the more active members of that group or were you just part of the group? A. Well, I instigated it and was active.

* * * * *
357 Q. (By Mr. Wilson) After the election will you tell us whether or not you became familiar with a group which was known as the Temporary Committee?
358 A. Yes.

Q. Will you tell us what connection you had with the Temporary Committee? A. Well, a sort of a co-sponsor or co-chairman.

Q. Along with whom else? A. Whitey Vaught, Arline Lindley and I believe Juanita Griffith.

Q. As one of the organizers or co-sponsor of this Temporary Committee will you tell us whether or not you undertook to form a permanent committee in more or less democratic fashion to take employee grievances to the director of industrial relations? A. We made plans and had a democratic election.

Q. And as part of such plans and in an attempt to bring such plans to fruition did you or did you not have an election wherein General Counsel's Exhibit 14-b which I hold in my hand was used as a ballot? A. That looks—

Q. You may look at it, of course, sir (handing). A. This looks like the one, um-hum.

Q. And as a result of that election conducted for the purpose that you have indicated did the NuTone employee relations committee come into existence? A. Yes.

Q. And it was part of your plan and through this
359 balloting was that part of your plan put into effect to have one representative from each department elected to the permanent committee? A. Well, that wasn't part of our plan. It was agreed it would be a sensible thing to do.

Q. And this election that we've been talking about was for the purpose of electing one representative from each department? A. Yes.

Q. To be on the committee that you've referred to? A. Right.

Q. And will you tell us whether or not it was further part of your plan as a co-sponsor of this temporary committee to form a committee, permanent committee to discuss with the director of labor relations Henry Mann wages, working conditions and incentive standards? A. No, we didn't get that far.

Q. Well, I'm not asking you whether this committee actually ever did discuss such things. I am asking you whether or not it was the plan of the temporary committee in establishing or having established the permanent committee to have a committee which could and would discuss with the director of labor relations Henry Mann wages, working conditions and incentive standards. A. Well, we

360 didn't discuss standards, but we did say grievances or things that we didn't think were fair.

* * * * *

364 Q. (By Mr. Wilson) Do you now remember that at the time you signed General Counsel's Exhibit Number 20 for identification it stated, "It is the intention of the committee to take employee grievances to the Director of Labor Relations Henry Mann and discuss wages, working conditions and particularly incentive standards with said Mann"? Can you remember that that was in here when you signed it? A. At the time I certainly must have or I wouldn't have signed it.

* * * * *

369

Virgie Marshall.

a witness called by and on behalf of the General Counsel, being first duly sworn, was examined and testified as follows:

* * * . * . * * * * *

425 Q. As I understand it, there had been no distribution of union literature before June 9? A. We had signed some cards, but there had been no distributing of literature at the plant.

Q. Yes. And the first distribution occurred on the 11th? A. Yes, sir.

Q. That's when you were there? A. I was there 426 in Bob Lamons' car.

Q. Yes, but you didn't distribute any? A. No, sir, not that day I didn't.

Q. And no employee of the Company distributed any that day? A. No, sir.

427

Della Puckett.

a witness called by and on behalf of the General Counsel, being first duly sworn, was examined and testified as follows:

* * * . * . * * * * *

442 Cross Examination

* * * . * . * * * * *

447 Q. Did you pass out any literature for the Steelworkers? A. You mean after I was laid off?

Q. Yes, ma'am. A. Yes, sir.

448 Q. Did you pass it out outside the plant? A. Yes, sir.

Q. And where did you pass it out?

Mr. Wilson: I object, Mr. Trial Examiner, unless we have a time fixed.

Trial Examiner: Will you fix the time, please, sir?

Q. (By Mr. Atwood) Did you pass out literature between June 11 and August 19? A. Yes, sir.

Q. Did you pass out literature between August 1 and August 19? A. Yes, sir.

Q. Where did you stand ordinarily when you passed out the literature between August 1 and August 19, 1953?

Mr. Wilson: I object, Mr. Trial Examiner; irrelevant, immaterial.

Trial Examiner: I'll hear from you, Mr. Atwood.

Mr. Atwood: It again is related to my defense.

Trial Examiner: Well, there's been no defense indicated at this time that bears any relation to that subject matter.

Mr. Atwood: Well, may I have the same ruling with respect to Mrs. Della Puckett as I have had with respect to Virgie Marshall?

Trial Examiner: You may call her when your case is going in. I'm not sure that that would make it any 449 more relevant then. We'll just have to await developments. But you have the option of calling her then if you wish.

* * * * *

Charlotte Puckett

a witness called by an on behalf of the Respondent as if upon cross-examination, being previously duly sworn, resumed the stand, was examined and testified further as follows:

Cross-Examination

* * * * *

740 Q. In the period between approximately August 1st and August 19th did you pass out literature for the Steelworkers at the NuTone plant? A. I did.

Q. Did you do that frequently? A. What do you mean?

Q. Whenever there was literature passed out did you pass it out? A. I mean I was out there with them.

Q. While you passed out the literature where did you usually stand with relationship to the parking lot, toward Madison, or did you stand on the Red Bank side of the plant? A. I stood over at the corner of the parking lot by the gas station most of the time.

1043

General Counsel's Exhibit 6

August 5, 1953

RULE ABOUT USING COMPANY PROPERTY

It must be understood throughout the entire plant that the company does not permit posting of signs—of any kind—on company property. I would appreciate it if *all* employees—regardless of how they feel on the union issue—would avoid attaching signs to company property.

Wherever we find them—we will be compelled to destroy such signs.

NuTONE, INC.

1044

General Counsel's Exhibit 7

To: All Foremen

August 10, 1953

Subject: Rule About Soliciting And Campaigning on Company Time.

It must be understood by all employees that the company does not permit soliciting and campaigning on company time. This applies to both sides of the union issue. Such activity must be confined to the employees' own time.

NuTONE, INCORPORATED

1045

General Counsel's Exhibit 8

To: All Foremen

August 12, 1953

Subject: Rule about passing out literature on company property.

This is a warning to all employees—whether they are for or against the union—that the company does not permit employees to pass out handbills or other literature on company property. People who engage in such activities must stay outside of the company property line which is the inner edge of the sidewalk.

Will you please post this notice in your department.

HENRY MANN

Henry Mann

Director of Industrial Relations

Do You Know This TRUTH about...

STRIKES

Everyone knows that strikes can ruin your family! This Steelworker's Union is famous for long and costly strikes. We have the records to prove it.

Don't forget -- you may be paying on a house, a car, furniture or a T.V. set. Steady work at NuTone gives you the money to take care of your family.

DON'T LET THESE UNION BOSSES WRECK YOUR FAMILY!

NuTone, Inc.

PLEASE READ CAREFULLY THIS ATTACHED LETTER ON WAGES!

Remember that wages means *all* money you get from NuTone. It means your hourly rate *plus* the incentive bonus. You have to add *both* of them together—and that makes your total rate. These CIO Union people *don't like* incentive bonuses. Very few union shops *anywhere* pay incentive bonuses. They certainly don't pay incentive bonuses in the big steel mills of Pittsburgh—or Newport, Kentucky. That's where this CIO Steelworker Union has most of its members.

Some people have asked us why a few NuTone Departments pay different bonuses than others. The answer is that Punch Press work is more *risky*—so they get higher bonus. *Anyone* at NuTone can always ask for a transfer to Punch Press Department if they want that work. The same for Spot Welding and Paint Department. You can always get a transfer to these departments.

Now—about Grievance Committees. Ask anyone in Punch Press department—and they'll tell you—they had a Committee of 8 men and women (night and day shifts)

that met twice with us. I was at the first meeting. Then all 26 Punch Press people met with us—because they thought a few incentive rates were “close” and *we changed the rates at their request*: We also offered them a *high flat rate per hour*—instead of incentive—if they wanted it that way. They said NO—they were satisfied with their checks—and didn’t want to change the incentive pay. We met the whole Punch Press Department *at their request*—within a few hours after they asked for a meeting. Do you call that a “phony grievance committee”—like these 3 CIO girls wrote you?

Now—about Seniority—ask the Union organizers if it isn’t true that most Union kind of seniority *goes only by departments*. If there’s no work in one department in a Union shop—*everyone* in that department is laid off. At NuTone—we transfer people to another department—from Chimes to Fans or from Fans to Chimes—to keep them busy. And we give them a *guaranteed bonus* in their new work—until they make the same average pay they earned in their previous job. *That’s true seniority!*

Everyone know that anytime our employees want to form a Grievance Committee to hear complaints—they could choose their own Committees. A few weeks ago—when the employees in Shipping and Packing Departments signed a petition that they needed a water fountain—they got that fountain in *one day!* That’s the way we listen to our employees at NuTone.

NUTONE, INC.

1055 LOOK AT YOUR PAY CHECKS — THEY ARE HIGHER THAN C.I.O. FACTORIES DOING WORK LIKE NUTONE!

This letter is about wages. You have been told many untruths about wages . . . here are the facts.

1. The Truth About the Newport Steel Company

These CIO Union people told you—in one of their circulars—that Newport Steel Company paid their workers \$1.52 an hour. But—they didn’t tell you that there are no women working in that plant—and that they are all men who do hot and heavy steel manufacturing

work. They also didn't tell you that there was an 11-week strike at Newport Steel—and their \$1.52 an hour pay dropped down to \$1.20 an hour—when you figure the money they lost during those 11 weeks.

2. Punch Press

The Grote Mfg. Co., of Bellevue, Kentucky, is a C.I.O. Steelworker factory. They pay their Punch Press operators \$1.26 to \$1.36 an hour. This is \$50.40 to \$54.40 gross weekly pay. It is less than that—after the Government taxes are taken out. Our NuTone Punch Press operators make so much more money than these CIO punch press people—there is absolutely no comparison! You NuTone Punch Press operators know this to be the truth. *Look at your pay check* and see how much more money you make.

3. Spot Welders

This same Grote Mfg. Co. in Kentucky pays their Spot Welders \$1.21 to \$1.31 an hour. This is \$48.40 to \$52.50 gross weekly pay. It is less than that—after the Government taxes are taken out. These CIO Spot Welders do the same kind of spot welding that our men do. Let our NuTone Spot Welders answer this question—*How much more do you make* than the Spot Welders in that CIO factory? *Look at your pay check* and see how much more money you're making!

4. Paint Department

And now—about our Paint Department. The CIO Steelworkers can't name a company in all of Cincinnati—doing work similar to NuTone—where the Spray Painters make as much money a week as our NuTone Painters. We say this to our Paint Department employees... *Look at your pay check* and see how much more money you're making!

5. Assembly Department

The employees in our Assembly Department also make good money—and they know it. The RCA factory (CIO) right near here—start their girls at \$1.08 an hour and NO BONUS. That's \$43.20 gross weekly pay. And it's

less than that after the Government taxes are taken out.

Our Assembly girls make more than \$43.20 a week—
1056 even our new girls know that. It takes RCA As-

sembly girls a long time to make anything near the money that our experienced NuTone Assembly girls make and our girls don't have to pay \$36.00 a year Union dues.

Remember this—because it's very important—It's an old trick of these CIO Union people to compare your wages with *different kinds of factories* that don't do the light manufacturing work that NuTone does. How can the Union compare rates with the *heavy work in steel mills—or machine tool plants—or heavy machinery factories*—with the rates in our kind of company?

We make Chimes and Kitchen Fans at NuTone.
THERE ISN'T A CHIME OR KITCHEN FAN MANUFACTURER IN THE UNITED STATES WHERE THE WORKERS MAKE AS MUCH WEEKLY PAY AS NUTONE.

Let this CIO Steelworker Union tell you whether or not they got raises for the workers at American Laundry Machine Company and Cincinnati Metalcraft! They organized these 2 plants and then called the workers out on long strikes. They not only *didn't* get raises for these workers—they don't even have signed contracts at either of these two factories today!

NUTONE, INC.

1057

General Counsel's Exhibit 11B

"THOU SHALT NOT BEAR FALSE WITNESS"

These 3 CIO girls don't know the meaning of the above. We said that we would pay them \$1,000. in cash—if they could prove that there was even *one* woman factory worker in that Los Angeles Woodworking plant. We'll pay them another \$1,000. if they can prove that there wasn't an election—with the AFL Union—in the NuTone plant on Eggleston Avenue—in November, 1941. The absolute proof that they're again telling you another falsehood is the following list of NuTone employees *who are now working in our factory . . .* all of them were at this 1941 National Labor

Relations Board Election (AFL) and voted in that election. Ask them!

Name	Dept.	Name	Dept.
Ollie Kinsel	Chimes	Red Haney	Fan
Alma Patton	Chimes	Bob Schaefer	Display
Margaret Hamlin	Chimes	Bernice Clifton	Repair
Martha King	Chimes	Rhoda Rich	Repair
Laura Kleeman	Chimes	Harvey Hurd	DiNoc
Rose Haney	Chimes	Arlene Lindley	Quality Control
Carlyn Essert	Chimes	Raymond Wiedmeyer	Maintenance
Mary Eads	Chimes	Bob Hanson	Maintenance
Myron Thetge	Chimes	Bob Bergman	Punch Press
Ruth Sharpe	Chimes	Ken Yancey	Production
Goldie Brown	Chimes	Bernie Gray	Shipping
Stella Milliechamp	Chimes	Eleanor Dick	Defense
Mildred Klein	Billing	Dollie Clarkson	Defense
John Baker	Paint	Pat Brannen	Defense

We beat the Union—6 to 1—at that Election!

I am now telephoning the Department of Labor, in Washington, D. C.—to get the exact day the election was held and the exact number of votes cast for both sides.

The Vacation checks of these 3 CIO gals—were for 2 weeks. We told you that in our letter. Their Vacation checks were given out at the same time most of you got your Vacation checks.

Now—you don't have to feel sorry for these 3 poor girls! Somehow they were able to "struggle along" on the following checks they got in April—when everyone in their department was earning good money—just before we ran short of steel.

		Date of Check	Amount
VIRGIE MARSHALL		April 4	\$64.61
		11	66.69
		18	65.99
		25	59.63
1058 DELLA PUCKETT		April 4	\$55.18
		11	53.74
		18	53.74
		25	56.36
CHARLOTTE PUCKETT		April 4	\$60.02
		11	57.32
		18	56.06
		25	52.59

These girls had Seniority—and their pay checks show that they were making good money. Most of our girls with Seniority are taking home good pay checks—just like these 3. Even the newer girls—because they are quickly learning to make good incentive bonus—have the same chance to make good money at NuTone.

At the bottom of page 1—in the circular they handed you this morning—they told another falsehood about our Life Insurance. Here is what they said:

"Employees with about 8 years seniority have only about half of that \$5,000.00."

How can they have the decency to look you in the face—when they hand out these circulars and tell such a terrible falsehood? *Every single person who now works at NuTone*—and who has been here 90-days or more . . . has \$2,500.00 Life Insurance—and they have their Prudential policy!

On the Bulletin Board, near the Lunch Room, is a list of 140 people who now have \$3,000. of NuTone Life Insurance. Each year we automatically add \$500. Insurance to everybody in the factory. In four years the persons having \$3,000. will have \$5,000. Life Insurance. Those now having \$2,500.—will in a short time have \$3,000. Everybody now working in the plant will have \$5,000. worth of Insurance between 4 and 5 years from today. The 3 CIO gals said it takes 8 years to get even \$2,500. Insurance.

They told you this morning that you pay \$3.80 for Hospital Care—for your share of the Family Policy. They're wrong again! You pay only \$3.08—and NuTone also pays \$3.08—towards your Family Policy. These 3 girls ought to go back to school and learn their arithmetic.

They ended their letter by picking the name of a girl who was laid off. This girl had one of the worst cases of 'absenteeism' in the NuTone plant. She was warned lots of times about this absenteeism. She was absent about $19\frac{1}{2}$ days in 1952—without proper excuse. These absences took place during many weeks of the year—until the head of her department said they couldn't depend on her coming in to work when she was needed. That was the real reason why she was let go.

NUTONE, INC.

1062

General Counsel's Exhibit 11F**NUTONE, INC.**

June 12, 1953

**A Special Message from Ralph Corbett
to Every Nutone Worker**

I was greatly surprised to learn Thursday afternoon that a local union organization distributed a misleading announcement to our people. They have a right to tell you the truth—but, they have no right to spread a pack of lies and that is why I'm going to answer their June 11th circular. Let's take their statements one by one and look at the facts.

1. They said that NuTone has a "gestapo attitude" regarding your right to join any union.

First of all—up to 4:30 P.M. yesterday afternoon we had no knowledge of any unionizing activity in our plant. I will let *you* judge whether you think NuTone ever adopted a "gestapo attitude" to any NeTone worker on the subject of joining—or not joining—a union. You know me well enough to judge whether my character is as bad as the union people tell you.

2. They said that lots of our people have already become members of their union and you should not be "one of the last ones to come in".

Don't be fooled by that kind of falsehood. If they had the number of members that they claim—they would have made official claim to that fact long ago. Don't be scared by wild statements which they cannot back up.

3. They said NuTone is "twenty years behind in rates of pay, working conditions, vacations, job security and seniority".

You know that these are just a pack of lies. The weekly pay envelope of our people is as good or better than similar plants in the city of Cincinnati. Look at your weekly pay check and compare the amount with other people in Cincinnati plants of our type and you will quickly detect union lie No. 1. The working conditions in the NuTone plant are as good as any factory in the

City of Cincinnati. Does anybody have a finer lunchroom than ours? Isn't it true we have an expensive air-cooling system in that lunchroom? Does any plant in town have any better equipped and cleaner washrooms than 1063 ours? How many small plants of our size have a registered nurse to take care of their people during working hours—free of any charges?

As to vacations—NuTone started the policy of giving its employees paid vacations when we went into business 15 years ago—long before any union ever claimed they could help *you* get such vacations. They also told a lie when they said that we cheat anyone out of vacation pay. It has been our policy for many years that a person who has been with NuTone for a minimum of a year, up to June 1st of each year—is entitled to a week's vacation with pay. After 5 years they receive two weeks vacation with pay. It is our policy that if any hourly paid worker was laid off—due to lack of work or lack of materials—if they were entitled to vacation—they would still be paid for that vacation—even if they were laid off. Those hourly paid workers whom we were forced to give a temporary lay-off after June 1st—whether or not we call them back before vacation time—will still receive their vacation pay. This does not apply if the employee voluntarily quits or is discharged for cause.

As for cheating anyone out of his Christmas bonus—you know how big that lie is. We have been giving generous Christmas bonuses for 15 years—and this Christmas bonus has *always* been based on *seniority*. Can you name me one person whom NuTone ever cheated out of a bonus?

These union people also said, in their June 11th letter, that "you are just as good as Mr. Corbett and are entitled to be treated the same". I'll let you be the judge as to whether I have ever knowingly hurt anybody's feelings in this factory—whether it be a boy who sweeps the floor—or the highest paid worker. You know that I have been most anxious about the welfare of you and your family—during sickness and during times of need. You know that I have tried to be your friend and have never mistreated a single one of you.

5. The union people tell you that "you have a right to join a union". Of course you have. But do they tell you—you also have a right *not* to join a union—if you don't want to. There is no law that says that you can't make up your own mind on this subject,—without outsiders telling you what you have to do.

You'll notice that these union people are trying to rope you in with promises that "there will be no charge to join the union". But, do they tell you that it will cost you \$36.00 a year in dues—after you join? Do they tell you anything about other fees, assessments and fines which these unions make? Also, do they tell you that they have been responsible in many cases for ordering strikes which were unpopular with the workers and caused great hardship and suffering to workers and their families? Remember—one of these strikes right here in Cincinnati—lasted 64 days—over 3 months of working days—causing many families hardships and losses which they won't get over for a long time.

Our NuTone workers have never been denied an opportunity to make a complaint to their foremen or factory superintendent or to me—and this policy still prevails.

Everyone here knows that we pay quick attention to 1064 anybody's complaint or grievance and try to settle it at once, and fairly. What can the union do for you that you can't do for yourself at NuTone? The answer is they want to take \$36.00 a year from you and perhaps lose you a lot of working days—when they cause disputes of one sort or another.

Don't be frightened or misled! Remember that NuTone grew to its present size by being willing to re-invest every dollar we've made and put it back into the company—and to give our workers security and a chance to grow with the company, year after year.

I'll leave it to you as to whether you think I am as bad a person as these fellows try to paint me. What do you think?

Sincerely,

J. RALPH CORBETT
J. Ralph Corbett
President

YOU LOSE

with C.I.O.

STEELWORKERS
UNION

STEELWORKERS UNION

1. **YOU LOSE SECURITY**
- because of long STRIKES.
2. **YOU LOSE part of your PAY**
- \$36 a year plus assessments and fines.

Vote NO



- NO . . means NO lost wages**
- NO . . means NO picketing**
- NO . . means NO Union Dues — NO fines, NO assessments**
- NO . . means NO hatred among Employees**
- NO . . means NO outsiders pushing you and telling you what to do**
- NO . . means NO UNION**

YOU WIN

with NuTone

1. YOU WIN the same kind of CHRISTMAS BONUSES

... which NuTone has been giving for years.
(remember 14 out of 19 CIO Cincinnati Factories give nothing for Christmas)

2. YOU WIN on INSURANCE

- because NuTone gives you up to \$5,000 Life Insurance.
(C.I.O. Factories in Cincinnati give as little as \$1,000 . . . one of them gives NO LIFE INSURANCE)

BE SURE
TO MARK AN X
UNDER NO

Don't write your name or anything else on the ballot.

To be valid your ballot must be marked — an unmarked ballot does not count.

A majority of the valid ballots determine the election.

ANSWERS TO FIVE UNION LIES

You veterans of World War II—remember that crazy Hitler said that if you tell a lie often enough—*some* people will believe it. It's hard to keep these Union bosses from telling lies. So we must answer their Tuesday night, August 11th, circular.

Union Lie Number 1

About vacation pay . . . They say we beat our employees out of their vacations.

The company rule . . . during *all* the years we have been in business—is that employees who have been with us for one year up to June 1st of every year—get *paid* vacations. Every person who was entitled to a vacation this year *got their paid vacation*. In fact—the 3 women who were laid off on June 9th—the ones the Union is talking about—also got their vacation pay.

Take a look at the copies of their 2-week vacation checks—after Government Tax and other deductions. There's the proof. See *their own endorsements* on their vacations checks!

Union Lie Number 2

They said we laid off 3 women who had seniority and didn't call them back to work. *Here are the facts.*

These 3 women worked on a chime model which had a big drop in sales. Early in June—we had thousands of these models in the stockroom. We laid off that whole line and later on called them all back to work. Then we called back *one* of these 3 women—sent her a Registered letter saying we expected to hear from her by a certain date. She didn't answer our Registered letter—until many days after the time we told her. Meanwhile—we hired someone else in her place.

In the case of the other 2 girls who were laid off—we decided not to take them back—for reasons which, at the proper time, we will tell the National Labor Relations

Board. This reason has nothing to do with their interest in a union.

* * * * *

Examine these checks . . . See the endorsements on other side.

1071 They said we hired new employees to take their places, that same week. We checked our Employment Records and found that one woman was hired in *Punch Press Department* and another in the *Altimeter Defense Repair Department*—but *nobody was hired that week in the Chime Department where these women had worked.*

Union Lie Number 3

They said we hire a lot of new employees during the rush season and lay them off between Thanksgiving Day and Christmas.

Now—here are the true facts! During the 16 years of NuTone—we always have temporary employment during November and December,—for a few people who want to earn some extra money for Christmas. Most of the people who take those *temporary* Christmas season jobs are friends or relatives of workers in our plant. They know the work is temporary—In fact, they don't want permanent work—because many of them have families and they refuse permanent work.

Now listen to these facts! Last Christmas we had 108 such *temporary* workers—who worked one to three months—up to the middle of December. *Each and every one of these temporary people got a \$10.00 check for Christmas—even tho' some were working only a few weeks.* They got their Christmas check on December 20th, 1952. We told everyone on this temporary list of workers—that if they wanted permanent work we would welcome them to NuTone. *And 78 stayed with us!*

Now—here's the proof that the Union people have lied. 78 of the 108 temporary workers are still working at NuTone. *They are here now.* Read the attached list of names and the dates they started with us! The other 30 people didn't want any permanent work . . . they just wanted extra money for Christmas.

We gave these 108 workers \$1,080.00 in Christmas checks—\$10.00 to each. We also gave a Christmas check to 32 new people in the Defense Department, who had been with NuTone only 1 to 3 months—making an extra \$320.00 for those 32 people. (When these people are with NuTone one year—they are eligible for \$50.00—Christmas Bonus.)

Union Lie Number 4

For the second day in a row—they made nasty remarks about the morality of the women in this plant. They call certain foremen “lady killers”. As for this scandal about the decent women of our plant—I’ll let the men and women of NuTone take care of that LIE. They know what they can do in the *secret ballot* box—on Wednesday, August 19th. They will answer this scandal talk on that day—with a big *NO*.

1072 Union Lie Number 5

If these CIO Unioneers will tell us the names of the 2 women they claim were laid off—we’ll give you the facts about them! There must be a mighty serious reason why anyone—with seniority—would be laid off. The same goes for the man they claim was laid off. It could be this man was someone who falsified his bonus records. Two weeks ago we told you about 3 men who were discharged for dishonesty. But—the silliest and most ridiculous lie of all—was that we laid one man off “because he was making too much money”. You men at NuTone who are making good money—and taking home *swell pay checks*—you know that nobody at NuTone ever complained to you about your making good money. When you earn lots of incentive bonus—we’re glad to see you have the money—because you deserve it!

As for hiring new women at 85¢ an hour—you know this is not true. This is the second time they told that kind of lie—but they’re repeating it—just like Hitler repeated his lies—because he thought *some* people would start believing his lies. Our new women workers make more money than at the RCA (CIO) plant—and we proved that to you in our letter on wages.

What we need at NuTone—is *not* a Union Contract. We need to get rid of Union bosses—Union trouble makers—and Union scandal about our decent women. We know you'll get rid of them—on August 19th—by voting "NO".

NUTONE, INC.

1073 LIST OF EMPLOYEES HIRED SHORTLY BEFORE CHRISTMAS, 1952 AND WHO ARE STILL WITH NUTONE

Name	Date Hired	Name	Date Hired
Adkins, Myrtle	10-14-52	Lewis, Joe	10-13-52
Amos, Everett	11-25-52	Lindsay, Audrey	9- 2-52
Ball, Ronald	10-20-52	Little, William	10-14-52
Bauer, Louanna	9-24-52	Maloney, Dorothy	10-14-52
Becknell, Coy	10- 7-52	Malsbary, Charlotte	9- 4-52
Bowling, Georgia	11-11-52	McCoy, Mary	9- 8-52
Brothers, Virginia	9-30-52	McEvoy, Joseph	12- 1-52
Brown, Mabel	9-19-52	McNamara, William	11-12-52
Butler, Richard	9-22-52	Morgan, Audrey	10-22-52
Calloway, Arcillas	11- 5-52	Morgan, Richard	11-11-52
Carnes, Larry	9-17-52	Munson, Pearl	9-10-52
Casch, Anna	10-28-52	Nugent, Pearl	9-10-52
Childres, Edward	11-18-52	Parks, Alice	11- 6-52
Cox, Louise	11-10-52	Payne, Juanita	9-15-52
Cresap, Geneva	10-13-52	Prentice, Pauline	11-11-52
Donnelly, Shirley	10-25-52	Proffitt, Daisy	10-13-52
Dunlap, Lynn	11- 7-52	Reed, Delia	9- 8-52
Edwards, Clifton	10- 7-52	Reilly, Loretta	10-24-52
Edwards, Hugh	10- 8-52	Reilly, Peter	9-29-52
Embry, Earl	9-29-52	Richards, Ethel	9-15-52
England, Virgil	10-29-52	Ruble, Harry	10- 2-52
Fink, Frances	10- 1-52	Rubia, Andrew	10-27-52
Frost, Cora	11- 5-52	Sanker, Margaret	10- 1-52
Gardner, Clara	11-11-52	Schulte, Zelma	10- 3-52
Glenn, Leonard	10- 6-52	Scoles, James	9-15-52
Grubb, Bessie	10- 2-52	Shannon, Theodore	9-12-52
Gumbert, John Jr.	9-19-52	Shawver, Mae	11-21-52
Guthier, Ralph	11-24-52	Simpson, Lillie	11- 5-52
Henry, Viola	11-11-52	Smith, John Jr.	9-10-52
Hensley, Minnie	9-17-52	Smith, John	11- 7-52
Howell, Florine	9-23-52	Spaeth, Charles	11-24-52
Hubbs, Milford	9-29-52	Spiess, Edith	11-11-52
Jordon, Soll	11- 3-52	Tipton, Chester	10- 6-52
Kidd, Geneva	11- 3-52	VanVuren, Richard	9-26-52
King, Cleo	10-15-52	Voight, Nellie	11- 3-52
King, Jessie	9-23-52	Voigtlander, Helen	11- 4-52
Kurkpatrick, Mary	11-28-52	Wells, Joyce	11- 5-52
Lane, Eva	11- 4-52	Wells, Jesse	10-23-52
Leighton, Dallas	10-17-52	Westerfeld, Harold	10- 6-52



Sunday, August 9, 1953

Dear NuTone Friends:

Once again I am writing you from my home. My letter may be long—I hope you have the patience to read it.

So many of you fine people wrote me an answer to my August 2nd letter—after the Union people attacked me twice. Your letters gave me courage and strength to continue this fight which was started by strangers. I thank you from the bottom of my heart for your wonderful letters.

Many of you told me you were praying for a Victory—because you thought our cause was right. Some of you have asked me to pray. I am not ashamed to tell you that ever since this trouble started, I have been on my knees each night—praying for spiritual help and strength. I suppose—these Union people will attack me again—saying I am using religious prayer to help guide me.

There is one thing that hurts me deeply. Everyone knows that I have always listened to complaints from anyone—and settled them at once. The door of my office is open to any NuTone employee. I have never pushed anyone around—like these Union people claim. Our foremen and plant managers know that my office is always open to any employee who has a complaint—and no foreman or manager has the power to stop a NuTone employee from coming to me—if they think they haven't been treated right. Maybe a Personnel Manager, who used to be with NuTone in 1952, didn't treat some of you right. But—you know he isn't here now. Henry Mann and his associates were picked by me—they will always be fair with you—but don't blame them for someone else's past mistakes. And, if any foreman didn't treat someone right—why didn't that person come to me—instead of going to outsiders—who will never treat them as fairly and honestly as I will. *We can have our own Grievance Committees, if you want to—and settle our own quarrels without outsiders interfering.* It isn't too late for those NuTone people who went over to the other side—even if they signed a union card. They have a legal and moral right to change

their mind—and vote NO. You have a right to give back their C.I.O. buttons—if you want to.

A few letters I received from our new, young employees touched me deeply. One young man wrote to me "I heard you were a good man. But some people were trying to poison my mind against you. They said you were a rich man's son—and didn't care about your employees. Why don't you tell us new people about yourself—give us some facts to help fight their lies. Why don't you defend yourself?"

1091 I'm going to listen to this young man's advice—but I didn't think I'd have to open up my private life—to defend myself against these C.I.O. Union attackers.

I am not a "rich man's son". I was born in Long Island, New York—of poor parents. I graduated from a New York City public school. I went to public high school for one year—but then my parents needed financial support, so I went to work as a mail clerk for an advertising company. I then attended night High School *after* working hours. I paid my own way and graduated high school—also helped my parents as much as I could.

I wanted to be a lawyer—but couldn't afford the cost. I took an examination and won a free scholarship to a Law School—and again worked after school hours. I'm not ashamed to tell you that even though I didn't have to pay the Law College—I had to borrow money to pay for my law books—and paid \$2.00 a week to the Loan Company. There were some weeks I missed my payments. I finally graduated Law School—but then a friend got me interested in Radio. I started to write and produce Radio Shows in New York—and started my own radio company. Then—in 1931—the Manager of W.L.W. heard of me—asked me to come to Cincinnati to be a consultant to W.L.W. I opened my office in the Carew Tower—produced shows like Jimmy Scribner's "Johnson Family"—also "Famous Jury Trials" and "Hymns of All Churches". This Hymn Show started on W.L.W. and lasted 12 years—and spread over to 300 U.S. radio stations. When I produced "Hymns of All Churches"—I met and was helped by hundreds of Ministers, Priests and Rabbi's—of the Protestant, Catholic and Jewish churches.

In 1936—a man interested me in Door Chimes. I invested some money and later he dropped out. I started NuTone with 4 employees—with a rented space on Fourth Street. In those early days—even my wife helped wrap packages and take them down to the Post Office. It took 5 years of losses before we started making profits. Again—I'm not ashamed to tell you—because many people know it—I mortgaged my farm to raise money for NuTone. I also borrowed heavily in my personal life insurance. I still owe the Insurance Company—and am still paying interest on that loan.

Our old factory on Eggleston Avenue was unfit to work in—so a Cincinnati Bank loaned me money to start our new factory. We then went into making fans and heaters—needed more space—more machines—more tools and dies. And the Bank loaned me more money on a 10 year loan. We're now paying back this loan every month—also the interest on the loan.

1092 Although I draw a salary from the Company—NuTone has never paid any dividend. We needed the money for machines. Whenever there were profits—they were put back into more equipment and more buildings.

I think you know I work hard and long hours. Some businessmen have yachts—or motor boats or private aeroplanes. I don't own such things. I have three children—two of them still going to college. My boy Tom is almost 18—and, like any other boy, will soon be in Uncle Sam's army.

I told you my life story—because the young NuToner who wrote me said he wanted the truth from me. I have told you the truth—only because it may help you decide if I'm the kind of man these Union people say I am. And I'm not ashamed to tell you the facts—because my life is an open book.

Before these outsiders started this trouble—nearly 300 NuTone people signed a slip—telling me they were interested in someday buying some shares of NuTone stock. Does this sound like our people distrust me?

This was a peaceful factory—until these Union people came around to spread hate—to make some of our people distrust each other—to spread wild lies—to call at your

homes and threaten you. Maybe some other factories need a union to protect their employees—but the majority of our NuTone people feel we can “live and let live” with each other—without strangers spreading hate, lies, trouble and strikes.

Again, I say I hate nobody,—not even those NuTone people who turned against me. I pray that we can all learn to understand each other and help make this a better world to live in.

Sincerely,

J. RALPH CORBETT

J. Ralph Corbett

1093

General Counsel's Exhibit 14A

Notice to all NuTone Employees from a Temporary Factory Committee

All NuTone employees will be interested to know that an announcement will soon be made about each department electing people to an Employee Committee—to meet with the company and discuss problems which will help both the employees and the company. A temporary Committee was formed for the purpose of getting this plan started. The following is a report of what has happened so far.

On September 15, 1953, at 2:00 P.M., your Steering Committee, consisting of John Daum, Arlene Lindley, Juanita Griffith and Whitney Vaught, contacted Henry Mann and requested that the company meet with the Employee-Company Relations Committee and discuss things of mutual interest. Our purpose being to promote better understanding and cooperation between the company and employees.

Mr. Mann promised to convey our request to Mr. Corbett and secure a reply. When contacted, Mr. Corbett agreed to meet our Departmental Committee in his office at 3:30 P.M., Wednesday, September 16th, 1953. On that date, your Temporary Committee met with Mr. Corbett, Mr. Bladh and Mr. Mann, and the following statement was submitted and read by the Committee:

“This Committee was formed for the express purpose of improving the relations between the Company and its employees. We feel the need for some method to be arranged, whereby the employees and Company alike

will sit down with a willingness and sincerity on both sides to seek a fair solution to our mutual problems. At that time everyone may feel free to express his views and cooperate in a manner to make NuTone not only a good place to work,—but the best place to work in Cincinnati.

"This first temporary committee was picked at random throughout the plant and a meeting was called. At the meeting it was decided to seek the cooperation of the Company. If it is agreeable to the Company:

1. We would like some arrangements made for holding free democratic elections in every department, so that the employees may choose their own representatives by majority vote.
2. Some procedure set—up pertaining to meetings with the Company representative and the duly elected chairman and representatives from each department."

The Company agreed with this movement and stated it was a step in the right direction, which would result in better relations between NuTone and NuToners. It was also learned at the time that the Company has a few gripes of its own, which they would like to present to the duly elected committee and secure the cooperation of the employees.

Henry Mann advised that he is available to meet with the temporary Committee at any time after they decide what plans can be made for holding a free election and then the time and place can be arranged so that it will be satisfactory to the Temporary Committee and the Company.

1094. The Members of the Temporary Committee follow:

Chairmen: Juanita Griffith, John Daum, Arlene Lindley and Whitey Vaught.

Committee Members:

Punch Press—Ada King and Edna Clem.

Welding—Helen Sapp and Russell Cox.

Chime C—Ruth Minella.

Chime B—Mary Holden.

Chime D—Mary Jane Tierney, Elva Pence and Eva Hensley.

Paint, Tube, Buffing, and Metal Cleaning—Fay Davidson, Bill Herrick and Harvey Hurd.

Chime A—Lillian Anderson and Erma Flannelly.

Display—Joe Griffith.

Defense—Dollie Clarkson.

Packing & Shipping—Bill Sorrell.

Warehouse & Shear—Dallas Prawl.

Fan—Margaret Ball and Bill Ficker.

Inspection—Earl Bendel.

Night—Oscar Sandlin and Loretta Reiley.

In a few days—we will tell you how each department will elect people to the New Committee which will take the place of this Temporary Committee.

STEERING COMMITTEE

JOHN DAUM

ARLENE LINDLEY

JUANITA GRIFFITH

WHITEY VAUGHT

1114 IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 12754

UNITED STEELWORKERS OF AMERICA, CIO, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT
NUTONE, INCORPORATED, INTERVENOR

No. 12812

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

NUTONE, INCORPORATED, RESPONDENT
UNITED STEELWORKERS OF AMERICA, CIO, INTERVENOR

On Petition to Review and Modify an Order of the
National Labor Relations Board (No. 12754) and on
Petition to Enforce the Order (No. 12812)

Mr. Arthur J. Goldberg, with whom Mr. David E. Feller
was on the brief, for petitioner in No. 12754 and inter-
venor in No. 12812.

1115 Mr. Arnold Ordman, Attorney, National Labor Rela-
tions Board, of the bar of the Supreme Judicial
Court of Massachusetts, *pro hac vice*, by special leave
of Court, with whom Mr. Marcel Mallet-Prevost,
Associate General Counsel, National Labor Relations
Board, was on the brief, for respondent in No. 12754 and
petitioner in No. 12812. Miss Fannie M. Boyls also
entered an appearance for respondent in No. 12754
and petitioner in No. 12812.

Mr. Charles A. Atwood for intervenor in No. 12754
and respondent in No. 12812. Mr. Thomas E. Shroyer
also entered an appearance for intervenor in No. 12754
and respondent in No. 12812.

Before PRETTYMAN, WILBUR K. MILLER, and BASTIAN,
Circuit Judges.

Opinion—November 23, 1956

Prettyman, Circuit Judge: These two cases come here from the National Labor Relations Board. The United Steelworkers of America began in the spring of 1953 a campaign to organize the employees of Nutone, Incorporated, a manufacturing concern of Cincinnati, Ohio. The campaign was heated but not violent. The ensuing election was lost by the Steelworkers, and shortly thereafter an unaffiliated union was formed in the plant. The Steelworkers filed with the Labor Board charges against Nutone, a complaint was issued, hearing was held, and a trial examiner's report and recommended order were issued. Exceptions were filed, and the Board adopted the examiner's conclusions in part and rejected them on one issue. The Steelworkers petitioned this court for review (No. 12754), and the Board petitioned for an enforcement order (No. 12812).

Upon the prehearing conference held in this court the issues in the two cases were phrased by stipulation made by the parties. We turn first to the *Steelworkers* case. The two issues there concern the denial of reinstatement and back pay to an employee named Virgie Marshall and the enforcement by the employer of a no-distribution rule against the union while it (the employer) distributed anti-union literature.

1116 While the organization campaign was in progress a temporary layoff due to economic conditions occurred. Virgie Marshall was among the employees laid off. She was a pro-union advocate and, according to the record, possessed an unusual talent for vivid oral expression. She directed this talent at fellow workers outside the plant. The examiner said the witnesses attributed to her "vile and obscene statements, as well as cursing and profanity." References to the record indicate that his description was pallid. He recommended against requiring her reinstatement. Recognizing that "in the realities of industrial life, particularly where vital issues are at stake during a strike or an organizing campaign, employees frequently express their sentiments in crude and

vulgar language, not suited either to the pleasantries of the drawing room or to the courtesies of parliamentary disputation", the examiner was nevertheless of opinion there are limits to permissible verbal assault. He thought there are bounds of language beyond which an employee may not go and still retain his or her right to reinstatement. The Board agreed with the examiner. We have no difficulty in agreeing with the examiner and the Board on the point.¹ Perhaps such boundaries are far-flung, but wherever the line is drawn it will fail to encompass as permissible the language used by Virgie Marshall. The Board's power is to take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of the Act.² The basic policy of the Act is industrial peace. The Board is justified in believing that there is language which, when applied directly and personally to fellow workers, is disruptive of that peace and tends to preclude settlement of disputes.

The second issue is a close and difficult one. The company, prior to and during the organization campaign, had and enforced rules forbidding employees to engage in solicitation of any kind on company time or to distribute on company property any literature or to post thereon any signs. The company itself, however, regularly posted signs and distributed literature on its property. During the campaign the company enforced uniformly the no-solicitation and no-distribution rules against both groups of contending employees, but it did not deem itself bound by these rules and distributed on its property eight pieces of anti-union but non-coercive literature.

The issue before us, as stipulated by the parties, is: Whether an employer commits an unfair labor practice if, during a pre-election period, it enforces an otherwise valid rule against employee distribution of union literature in the plant, while, during that same period, itself distributing non-coercive anti-union literature within the plant in a context of other unfair labor practices, committed prior to the election period and thereafter.

¹ See National Labor Rel. Bd. v. Longview Furniture Co., 206 F.2d 274 (4th Cir. 1953).

² 61 STAT. 147 (1947), 29 U.S.C.A. § 160(e).

This stipulation of the issue is, we may safely assume, precisely drawn. The issue is not the naked question whether the employer commits an unfair labor practice by distributing his own literature. Neither is it the naked question whether the employer commits an unfair labor practice when he enforces a no-distribution rule against his employees. The issue is whether it is an unfair labor practice for the employer to do both things at the same time, *i.e.*, simultaneously distribute his own literature and prohibit his employees from distributing theirs. Thus the problem is not the application of any single provision of the statute but involves the interplay of several rights, some statutory and some inherent. Section 7 of the Act³ gives employees the right to organize. Section 8(a)(1)⁴

protects that right by making it an unfair labor practice for an employer to interfere with his employees in their exercise of the right. Section 8(c)⁵ provides

that the dissemination of views in writing shall not constitute an unfair labor practice, if such expression contains no threat of reprisal or force or promise of benefit. Both employer and employees have rights of free speech. The employer has certain other inherent rights, such as the rights to production, to orderly conduct, and to cleanliness and order on his property. Sometimes these several rights conflict.⁶ We have such a problem here.

We first explore the situation presented by general considerations, absent subsection (c) of Section 8 of the Act. Except for the effect of legislation, and particularly Sections 7 and 8(a)(1) of this Act, an employer's power to make rules governing employee organizational activities on company premises would be largely unlimited. Absent legislation he could promulgate and enforce rules prohibiting employees from soliciting in favor of a union or distributing union literature on the premises, solely

³ 49 STAT. 452 (1935), as amended, 29 U.S.C.A. § 157.

⁴ 49 STAT. 452 (1935), as amended, 29 U.S.C.A. § 158(a).

⁵ 61 STAT. 142 (1947), 29 U.S.C.A. § 158(c).

⁶ *E.g.*, Republic Aviation Corp. v. Board, 324 U.S. 793, 89 L.Ed. 1372, 65 S.Ct. 982 (1945); Labor Board v. Babcock & Wilcox Co., 351 U.S. 105, 100 L.Ed. —, 76 S.Ct. 679 (1956).

because he was opposed to employee organization. The perquisites of possession or ownership shielded any anti-union purpose behind the employer's rules, just as liberty of contract shielded anti-union conditions on employment or discharge for union affiliations and activity. Under the statute, however, employees have a right to organize and to engage in activities in aid of organization. That is a broad and strong right, although it is not without limits. It does not take precedence over the right of an employer to conduct his business in a reasonable manner and with reasonable prospects of success. But the property rights of an employer do not, as a general principle, justify restrictions on self-organization
1119 not reasonably related to the conduct of the enterprise in which he is engaged. Just as discharge of a union adherent is justified if there is "cause" for the employer's action,⁷ so too there must be "cause" for limitation of employee organizational activities.⁸ The Supreme Court recently made this clear, saying, with respect to the rights of employees on company premises, "No restriction may be placed on the employees' right to discuss self-organization among themselves, unless the employer can demonstrate that a restriction is necessary to maintain production or discipline."⁹

It is well established that no-solicitation rules are valid as to working time because of the obvious interest in maintaining productive activity, and that they are valid as to non-working time in certain establishments such as

⁷ See 61 STAT. 147 (1947), 29 U.S.C.A. § 160(c).

⁸ Even where there is some valid purpose relating to production or discipline, the limitation may have so great an effect on employee rights that some disruption of the employer's usual freedom of action may be deemed necessary. See, e.g., Bonwit Teller, Inc. v. National Labor Relations Bd., 197 F.2d 640 (2d Cir. 1952), cert. denied, 345 U.S. 905, 97 L.Ed. 1342, 73 S.Ct. 644 (1953).

⁹ Labor Board v. Babcock & Wilcox Co., 351 U.S. 105, 113, 100 L.Ed. —, 76 S.Ct. 679 (1956). See also National Labor Relations Board v. Seamprufe, Inc., 222 F.2d 858 (10th Cir. 1955), aff'd, 351 U.S. 105, 100 L.Ed. —, 76 S.Ct. 679 (1956); Maryland Drydock Co. v. National Labor Rel. Bd., 183 F.2d 538 (4th Cir. 1950); National Labor Relations Bd. v. American Furnace Co., 158 F.2d 376 (7th Cir. 1946); National Labor Relations Bd. v. American Pearl Button Co., 149 F.2d 258 (8th Cir. 1945).

department stores because of the peculiar circumstances of the business.¹⁰ But, where such circumstances do not exist and rules restricting solicitation are applied to non-working time, they are generally invalid as to employee activities.¹¹

No-distribution rules have had a checkered history. At one time the Board held that in the interests of keeping the plant clean and orderly it was not unreasonable for an employer to prohibit the distribution of literature on plant premises at all times.¹² Later the Board took the position that, absent a particular showing that the rule was necessary to plant discipline, an employer could not validly apply such a rule to employees on non-working time.¹³ Finally, in *Monolith Portland Cement Company*,¹⁴ the Board held that a no-distribution rule relating to the plant proper could be applied generally to non-working time, absence special circumstances, discrimination, or a specific purpose to suppress self-organization.

Our attention has not been called to any case under the Wagner Act or its successor in which it has been held that an employer can prohibit either, solicitation or distribution of literature by employees¹⁵ simply because the premises are company property.¹⁶ Employees are lawfully within the plant, and non-working time is their own time. If Section 7 activities are to be

¹⁰ National Labor Rel. Bd. v. May Department Stores Co., 154 F.2d 533 (8th Cir. 1946), *cert. denied*, 329 U.S. 725, 91 L.Ed. 627, 67 S.Ct. 72 (1946). See also Marshall Field & Co. v. National Labor Relations Bd., 200 F.2d 375 (7th Cir. 1952).

¹¹ See Republic Aviation Corp. v. Board, 324 U.S. 793, 89 L.Ed. 1372, 65 S.Ct. 982 (1945); National Labor Relations Board v. Clark Bros. Co., 163 F.2d 373 (2d Cir. 1947); National Labor Rel. Board v. Glenn L. Martin-Nebraska Co., 141 F.2d 371 (8th Cir. 1944).

¹² Tabin-Picker & Co., 50 N.L.R.B. 928 (1943).

¹³ American Book-Stratford Press, Inc., 80 N.L.R.B. 914 (1948).

¹⁴ 94 N.L.R.B. 1358 (1951).

¹⁵ Cf. Labor Board v. Babcock & Wilcox Co., 351 U.S. 105, 100 L.Ed. ——, 76 S.Ct. 679 (1956).

¹⁶ In Midland Steel Products Co. v. National Labor R. Bd., 113 F.2d 800 (6th Cir. 1940), the court held that an employer could prohibit solicitation on company property at all times because of controversies and animosities likely to be aroused among employees.

prohibited, something more than mere ownership and control must be shown.

In the instant case no question is raised concerning the rule barring solicitation on company property. Nor is there any dispute concerning the general validity of a broad no-distribution rule like the one in effect at Nutone. However the justification for a broad no-distribution rule by an employer is the need for keeping the plant clean and orderly or the need to maintain discipline. And so Steelworkers argue that, if the company itself undertakes to distribute literature at approximately the same time that it prohibits employees from doing the same thing, the reason for the no-distribution rule is vitiated. They say that, if a rule must have a reason in fact to support it, a rule demonstrably without a reason is invalid. The argument, premised upon Section 7 of the Act, and ignoring for the moment subsection '8(c), is supported by the authorities, as we have indicated. Employees have no right to use their employer's premises to urge a political cause, to support a charity, or to promote programs alien to the right of self-organization; but they do have a right to engage in Section 7 activities, and that right must be given effect unless there is some valid reason to the contrary relating to production or discipline.

Thus we come to the next phase of the problem. Does the fact that the employer distributes literature on the plant property demonstrate that there is no valid reason (in cleanliness, order, production, discipline, etc.) for prohibiting distribution? If the employer himself distributes literature in the plant, how can he validly assert that the distribution of literature would litter the property, distract attention from production, or instigate argument to the disruption of discipline? When the employer strips himself of the reason for his objection, does he not thereby lose the right to object?

1122 In respect to distribution no one seems to dispute the right of an employer to impose upon his employees any and all restrictions, limitations, conditions, etc., which he imposes upon himself. These may relate to amounts, times, places, nature, and all the terms which may be imposed to protect order, cleanliness, production and

discipline. The question is whether the employer, by distributing under certain conditions or restrictions, thereby negatives the reason for prohibiting distribution under precisely those same conditions and restrictions.

This part of the problem is a matter of realism and common sense. It seems to us unrealistic to say that, if an employer distributes certain amounts of literature at certain places at certain times, he can nevertheless claim that the distribution of the same quantity of literature at the same places and at the same or similar times would be disruptive of order or cleanliness. This is one of the keys to the ultimate conclusion in the problem before us, but it is not susceptible of extended explanation or discussion. We think that, if an employer distributes literature in certain amounts under certain conditions, he cannot be heard to say that such distribution is a detriment to his operation; i.e., such a detriment as will support a restriction upon Section 7 rights of employees. It follows from *Labor Board v. Babcock & Wilcox Co.*¹⁷ and cases there cited that, being without a reason for a rule, he is not entitled to a rule of no-distribution.

But it is argued that to hold that an employer may not prohibit employee distribution if he himself distributes is to impose a condition upon the employer's right to distribute. It is said that the holding would be equivalent to holding that an employer cannot distribute unless he permits employee distribution under similar conditions. And that argument brings us 1123 face to face with subsection (c) of Section 8 of the Act. Section 8 relates to unfair labor practices, and subsection (c) is:

“The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this subchapter, if such expression contains no threat of reprisal or force or promise of benefit.”

¹⁷ *Supra* note 15.

Interpretation of this subsection has given rise to many difficulties,¹⁸ but we need not venture too far into the discussions in those cases. One view is that the subsection is absolute, the argument being that Congress was aware of the problem when it inserted this subsection in the statute in 1947. The *Republic Aviation* case¹⁹ had been decided in 1945, and the Supreme Court had described the case (and its companion case, *National Labor Relations Board v. Le Tourneau Company of Georgia*) in the following language: "These cases bring here for review the action of the National Labor Relations Board in working out an adjustment between the undisputed right of self-organization assured to employees under the Wagner Act and the equally undisputed right of employers to maintain discipline in their establishments."²⁰

1124 The Senate Report on the proposed subsection²¹ specifically referred to the restriction placed by the Board upon the decision in *Thomas v. Collins*²² and said that it believed the Board's decision in *Clark Bros. Co., Inc.*,²³ to be too restrictive. If Congress, with the general problem thus before it, had intended that the dissemination of views be subject to other limitations, it would have said so. The subsection says flatly that the dissemination of views in written form shall not constitute an unfair labor practice if the expression contains no threat of reprisal or promise of benefit. It contains no other condition or limitation. To say the subsection means that such distribution shall not constitute an unfair labor practice

¹⁸ Bonwit Teller, Inc., 96 N.L.R.B. 608 (1951), *enforcement denied*, 197 F.2d 640 (2d Cir. 1952), *cert denied*, 345 U.S. 905, 97 L.Ed. 1342, 73 S.Ct. 644 (1953); Livingston Shirt Corporation, 107 N.L.R.B. 400 (1953); *National Labor Relations Bd. v. F. W. Woolworth Co.*, 214 F.2d 78 (6th Cir. 1954). And see Note, *Limitations upon an Employer's Right of Noncoercive Free Speech*, 38 V.A. L. REV. 1037 (1952); Note, *The Coercive Character of Employer Speech: Context and Setting*, 43 GEO. L. J. 405 (1955).

¹⁹ *Republic Aviation Corp. v. Board*, 324 U.S. 793, 89 L.Ed. 1372, 65 S.Ct. 982 (1945).

²⁰ 324 U.S. at 797-798.

²¹ S. REP. No. 105, 80th Cong., 1st Sess. 23-24 (1947).

²² 323 U.S. 516, 89 L.Ed. 430, 65 S.Ct. 315 (1945).

²³ 70 N.L.R.B. 802 (1946), *enforcement granted*, 163 F.2d 373 (2d Cir. 1947).

when, as, and if it is coupled with permission to employees to distribute would be to write into the statute a condition not there. The foregoing is the course of one side of the debate.

The other view is that the subsection undoubtedly wipes out the taint of discrimination which might attach to a speech by an employer favoring one union as against another, or against any and all unions, and which might thus be illegal as unfair.²⁴ It wipes out the obligation of an employer to afford affirmatively to his employees equal opportunity with himself to distribute or to solicit. But it does not wipe out the basic rule that in order to enforce a no-distribution rule against employees the employer must have a valid reason.

The former of the foregoing views is the one taken by the Court of Appeals for the Sixth Circuit in the 1125 *Woolworth* case²⁵ and by Judge Swan dissenting in *Bonwit Teller*.²⁶ With the utmost deference to those authorities we find ourselves in disagreement with them. We think the latter of the two views above described is correct.

We suppose everyone would agree that the question is a close and elusive one. Indeed the answer might almost seem to depend upon the way in which the question is put. If we ask, "May an employer distribute non-coercive literature on plant property if he does not also permit employees to do the same thing?", the answer might seem to be, under subsection (c), "Yes." But that is not the question here. The question is: May an employer prohibit employees from distributing literature on plant property if he has by his own action demonstrated the absence of a valid reason for such a prohibition? And the answer to that question must be: He may not.

We think the conclusion we reach does not write an improper restriction upon a statutory provision not so re-

²⁴ See, e.g., *National Labor Relations Bd. v. American Furnace Co.*, 158 F.2d 376 (7th Cir. 1946).

²⁵ *National Labor Relations Bd. v. F. W. Woolworth Co.*, 214 F.2d 78 (6th Cir. 1954).

²⁶ *Supra* note 8, 197 F.2d at 646.

stricted in terms. Section 8 of the Act flatly prohibits an employer from interfering with the organizational activities of his employees. But the Board and the courts have held that he may interfere with those activities for reasons which he finds in the needs of production, order, cleanliness or discipline. That permission to him is not in the statute in terms. It was a recognition by the enforcing authorities of inherent rights on the part of the employer. It takes no amendment to the statute to say that, when this permission, engrafted upon the statute, is not applicable to a given employer, the unrestricted prohibition of the statute against interference with employee activities comes into play. The statute itself is not thereby amended; it thereby comes into literal effect.

1126 We are fully aware of the restrictions upon judicial review of Board findings and orders, but the present case concerns statutory interpretation and clearly falls within the competence of the court to rule upon the questions presented.

We conclude that the employer here, Nutone, Incorporated, was guilty of an unfair labor practice when it prohibited its employees from distributing organizational literature on company property during non-working hours. The Board's conclusion to the contrary must be set aside and the case remanded with directions to modify paragraph (c) of the order so as to require Nutone to cease and desist from enforcing its no-solicitation and no-distribution rules in a manner inconsistent with this opinion.

This brings us to the case brought here by the Board for enforcement of its order and Nutone's answer to the Board's petition. The questions, as stipulated, concern the sufficiency of the evidence to support three findings by the Board: (1) that Nutone violated Section 8(a)(1) by certain actions toward employees in respect to union activities; (2) that Nutone's failure to recall certain employees after an economic layoff was because of union activity; and (3) that a certain employee (Puckett) did not so conduct herself as to render her unsuitable for reinstatement. We have examined the evidence from which the Board derived these findings and think it is substan-

tial. The portions of the Board's order based upon these findings will be affirmed.

Upon the foregoing bases the order of the Board must be modified as indicated in this opinion and, as so modified, will be enforced.

**1127 IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

October Term, 1956

No. 12,754

UNITED STEELWORKERS OF AMERICA, CIO, *Petitioner*,

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent*,

NUTONE, INCORPORATED, *Intervenor*

No. 12812

NATIONAL LABOR RELATIONS BOARD, *Petitioner*,

v.

NUTONE, INCORPORATED, *Respondent*,

UNITED STEELWORKERS OF AMERICA, CIO, *Intervenor*.

On Petition to Review and Modify an Order of the National Labor Relations Board (No. 12,754) and on Petition to Enforce the Order (No. 12,812).

Before: Prettyman, Wilbur K. Miller and Bastian, Circuit Judges.

Order and Decree—November 23, 1956

These cases came on to be heard on the record from the National Labor Relations Board, and were argued by counsel.

ON CONSIDERATION WHEREOF, it is ordered and decreed by this Court:

- (1) that these cases be, and they are hereby, remanded to the National Labor Relations Board with directions to modify paragraph (c) of the order involved herein in conformity with the opinion of this Court;

- (2) that for the foregoing purpose the Clerk be, and he is hereby, directed to issue forthwith to the National Labor Relations Board a certified copy of this order and decree;
- (3) that the order of the National Labor Relations Board, as so modified, be enforced;
- (4) that within ten days herefrom the Board shall file a supplemental record containing its order modifying paragraph (c) of its order herein in conformity with the opinion of this Court, and shall also submit, in accordance with Rule 38(1) of this Court, a proposed enforcement decree.

Dated: November 23, 1956.

Per Circuit Judge Prettyman.

**1129 IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

No. 12,754

UNITED STEELWORKERS OF AMERICA, CIO, Petitioner,

v.

**NATIONAL LABOR RELATIONS BOARD, Respondent,
and**

NUTONE, INCORPORATED, Intervenor

No. 12812

NATIONAL LABOR RELATIONS BOARD, Petitioner,

v.

**NUTONE, INCORPORATED, Respondent,
and**

UNITED STEELWORKERS OF AMERICA, CIO, Intervenor.

**Decree Enforcing, as Modified, an Order of the National Labor
Relations Board—January 16, 1957**

Before: Prettyman, Wilbur K. Miller and Bastian, Circuit Judges.

This cause came on to be heard upon the petition of United Steelworkers of America, CIO (No. 12,754) to re-

view an order of the National Labor Relations Board issued against NuTone, Incorporated on June 13, 1955, and upon the petition of the National Labor Relations Board (No. 12,812) to enforce the said order. This Court on March 2, 1956 and September 10, 1956 respectively heard argument and reargument of respective counsel, and has considered the briefs and transcript of record filed in this cause. On November 23, 1956, the Court, being fully advised in the premises, handed down its decision, enforcing the Board's order of June 13, 1955 as modified. In conformity therewith, it is hereby

1130 ORDERED, ADJUDGED AND DECREED that the Respondent in No. 12,812, NuTone, Incorporated, Cincinnati, Ohio, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Discouraging membership in the United Steelworkers of America, CIO, or in any other labor organization of its employees, by failing to recall them after layoff, or in any other manner discriminating in regard to their hire or tenure of employment or any term or condition of employment.

(b) Assisting, contributing support to, or in any other manner interfering with the formation and administration of NuTone Employee-Company Relations Committee, or any other labor organization of its employees, or recognizing said Committee or any successor thereto as the representative of any of its employees for the purpose of dealing with them concerning grievances, labor disputes, wages, hours of work, or other conditions of employment unless and until said organization shall have been certified as such representative by the National Labor Relations Board, or shall have been freely chosen as such by a majority of the employees after all effects of unfair labor practices have been eliminated;

(c) Interrogating its employees concerning their Union membership and activities, soliciting them to report on such activities, or informing them that a layoff was due to such activities;

(d) In any other manner interfering with, restraining, or coercing its employees in the exercise of their right to self-organization, to form, join, or assist United Steelworkers of America, CIO, or any other labor organization, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any or all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in Section 8(a)(3) of the National Labor Relations Act, as amended (Hereinafter called the Act).

1131 2. Take the following affirmative action which the National Labor Relations Board has found will effectuate the policies of the Act:

(a) Offer to Charlottie Puckett and Della Puckett immediate and full reinstatement to their former or substantially equivalent positions, without prejudice to their seniority and other rights and privileges, and make them whole in accordance with the Board's usual remedial policies (*Chase National Bank*, 65 NLRB 827; *Crossett Lumber Co.*, 8 NLRB 440; *F. W. Woolworth*, 90 NLRB 289) for any loss of pay they may have suffered since June 23, 1953, by reason of the discrimination against them;

(b) Make whole Virgie Marshall, in the manner prescribed in paragraph (a), supra, for any loss of pay she may have suffered from June 23, 1953 to August 18, 1953, inclusive, by reason of the discrimination against her;

(c) Withdraw all recognition from NuTone Employee-Company Relations Committee as the representative of any of its employees for the purpose of dealing with them concerning grievances, labor disputes, wages, hours of work, or other conditions of employment unless and until said organization shall have been certified as such representative by the National Labor Relations Board, or shall have been freely chosen as such by a majority of the employees after all effects of unfair labor practices have been eliminated;

(d) Post in its plant at Cincinnati, Ohio, copies of the notice attached hereto marked Appendix A. Copies of said notice to be furnished by the Regional Director for the Ninth Region of the National Labor Relations Board, Cincinnati, Ohio, shall, after being signed by Respondent's representative, be posted by Respondent immediately upon receipt thereof and maintained by it for sixty (60) consecutive days thereafter in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material; and

(e) Notify the aforesaid Regional Director, in writing, within ten (10) days from the date of this Decree, what steps Respondent has taken to comply herewith.

1132 IT IS FURTHER ORDERED, ADJUDGED AND DECREED
 that within ten days herefrom, subject to any stay granted by this Court, the National Labor Relations Board shall file a supplemental record containing its order modifying paragraph 1 (c) above in conformity with the opinion of this Court, said modification, if found appropriate by this Court, to be incorporated in this Decree and made a part thereof.

Dated: January 16, 1957

s/ E. BARRETT PRETTYMAN

Judge, United States Court of Appeals for the District of Columbia Circuit

s/ WILBUR K. MILLER

Judge, United States Court of Appeals for the District of Columbia Circuit

s/ WALTER M. BASTIAN

Judge, United States Court of Appeals for the District of Columbia Circuit

NOTICE TO ALL EMPLOYEES**PURSUANT TO**

A Decree of the United States Court of Appeals, enforcing, as modified, an order of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, as amended, we hereby notify our employees that:

WE WILL NOT discourage membership in the UNITED STEELWORKERS OF AMERICA, CIO, or in any other labor organization of our employees, by failing or refusing to recall them after layoff, or in any other manner discriminate in regard to their hire or tenure of employment or any term or condition of employment.

WE WILL NOT assist, contribute support to, or in any other manner interfere with the formation and administration of NUTONE EMPLOYEE-COMPANY RELATIONS COMMITTEE, or of any other labor organization of our employees, and we will not recognize said Committee as the representative of any of our employees for the purpose of dealing with us concerning grievances, labor disputes, wages, hours of employment, or other conditions of employment.

WE WILL NOT interrogate our employees concerning their union membership and activities, solicit them to report on such activities, or inform them that a layoff was due to such activities.

WE WILL NOT in any other manner interfere with, restrain, or coerce our employees in the exercise of their right to self-organization, to form, join, or assist UNITED STEELWORKERS OF AMERICA, CIO, or any other labor organization, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any or all such activities, except to the extent that such right may be affected by an agreement requiring membership in a labor organization, as authorized in Section 8(a) (3) of the Act.

WE WILL offer to Charlottie Puckett and Della Puckett immediate and full reinstatement to their former or substantially equivalent positions, without prejudice to their seniority and other rights and privileges, and make them whole for any loss of pay they may have suffered by reason of our discrimination against them.

WE WILL make whole Virgie Marshall for any loss of pay she may have suffered from June 23 to August 18, 1953, inclusive, by reason of our discrimination against her.

WE WILL withdraw and withhold all recognition from NUTONE EMPLOYEE-COMPANY RELATIONS COMMITTEE as the representative of any of our employees for the purpose of dealing with them concerning grievances, labor disputes, wages, hours of work, or other conditions of employment, unless and until said organization shall have been certified as such representative by the National Labor Relations Board.

NUTONE, INCORPORATED
(Employer)

Dated By
(Representative) (Title)

This notice must remain posted for 60 days from the date hereof, and must not be altered, defaced, or covered by any other material.

1138 Clerk's Certificate to foregoing transcript omitted in printing.

1139 SUPREME COURT OF THE UNITED STATES

October Term, 1956

No. 785

(Title Omitted)

Order Allowing Certiorari—April 1, 1957

The petition herein for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit is granted, and case transferred to the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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CITATIONS

Cases:

<i>Bonwit Teller, Inc. v. National Labor Relations Board</i> , 197 F. 2d 640, certiorari denied, 345 U. S. 905	7, 8
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<i>National Labor Relations Board v. Babcock & Wilcox Co.</i> , 351 U. S. 105	9
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<i>National Labor Relations Board v. F. W. Woolworth</i> , 214 F. 2d 78	7, 8; 11
<i>Republic Aviation Corp. v. National Labor Relations Board</i> , 324 U. S. 793	9

Statute:

National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C. 151, <i>et seq.</i>):	
Section 7	6, 9, 26
Section 8 (a) (1)	4, 27
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In the Supreme Court of the United States

OCTOBER TERM, 1956

No. —

NATIONAL LABOR RELATIONS BOARD, PETITIONER.

v.

UNITED STEELWORKERS OF AMERICA, CIO, AND NUTONE,
INCORPORATED

**PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT**

The Solicitor General, on behalf of the National Labor Relations Board, prays that a writ of certiorari issue to review the decision of the United States Court of Appeals for the District of Columbia Circuit, entered on November 23, 1956, holding, at the instance of United Steelworkers of America, CIO, that the Board had erred in dismissing a portion of a complaint alleging unfair labor practices by NuTone, Incorporated, and directing that the Board modify its order to conform to the court's opinion.

OPINIONS BELOW

The opinion of the court below (Appendix, *infra*, pp. 12-25) is not yet officially reported. The findings, conclusions, and order of the Board (R. 18-55, 57-69) are reported at 112 NLRB 1153.

JURISDICTION

The judgment of the court below was entered on November 23, 1956 (Appendix, *infra*, pp. 25-26). The jurisdiction of this Court is invoked under 28 U. S. C. 1254 and under Section 10 (e) and (f) of the National Labor Relations Act, as amended.

QUESTION PRESENTED

Whether a rule prohibiting employees from distributing literature in the employer's plant, otherwise valid under the tests enunciated by this Court, becomes invalid if the employer, himself, is distributing literature setting forth his own non-coercive views concerning unionization.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C. 151, *et seq.*), are reprinted in the Appendix, *infra*, pp. 26-29.

STATEMENT

Following the customary proceedings under Section 10 of the Act, the Board found that NuTone had engaged in a number of unfair labor practices against its employees, including unlawful interference with their organizational rights, discriminatory refusal to reinstate certain employees after an economic layoff, and unlawful support and assistance to an organization of its employees known as the NuTone Employee-Company Relations Committee (R. 57-60). The Board prescribed appropriate remedial relief for these violations (R. 61-63). However, the Board, one member dissenting, dismissed an allegation that Nu-

Tone had committed a further violation of the Act by discriminatorily enforcing a plant rule against employee distribution of literature in the plant (R. 59-60, 64-66). The court below, while generally affirming the Board's findings and order, reversed the Board with respect to its ruling on the no-distribution rule (App., *infra*, pp. 24-25). Since the validity of this reversal is the sole question presented by this petition, we shall set forth only the findings and conclusions relevant to this aspect of the case.

I.

THE BOARD'S FINDINGS AND CONCLUSIONS

NuTone, a New York corporation, operates a plant located on a public street in Cincinnati, Ohio, where it manufactures various electrical devices (R. 19). In the summer of 1953, United Steelworkers of America, CIO, engaged in an organizational campaign among NuTone's employees preparatory to a Board-conducted election scheduled for August 19, 1953 (R. 20; 113, 127). Prior to and during the organizational campaign, NuTone had in effect rules forbidding its employees to engage in solicitation of any kind on company time, to post signs of any kind, or to distribute any literature on company property (R. 26; 110). However, the company itself regularly posted signs throughout the plant and distributed literature, both for its own purposes and for charitable purposes or drives such as Community Chest (R. 25; 106, 109, 110).¹

¹ This was the company practice both before and after the commencement of the organizational campaign.

When the Steelworkers' campaign got under way, NuTone posted notices reminding its employees of the foregoing rules and stating that the rules applied equally to pro-union and anti-union employee groups (R. 26; 109-110, 112, 72-73). During the pre-election period, the rules were uniformly applied to the employees who favored the Steelworkers and to those who opposed the Steelworkers. (R. 26). Management, however, consistent with its prior practice, did not deem itself bound by the rules which were directed to its employees, and itself distributed to the employees at the plant eight pieces of pre-election literature (R. 26-27; 110, 112, 114, 74).² This literature was anti-union in tone but was free of threat of reprisal or force, or promise of benefit (*ibid.*).

The parties did not challenge the company rules relating to solicitation and distribution, and both the trial examiner and the Board affirmed their legality (R. 28, 59, n. 2). The trial examiner was of the view, however, that the ban on employee distribution of literature in the plant precluded management from utilizing that medium of communication; and that NuTone's distribution of anti-union literature in the plant, even though the content of that literature was not coercive, constituted a discriminatory application of the rules, in violation of Section 8 (a) (2) and (1).

² During the same period, NuTone used the mails to send ten other pieces of non-coercive, anti-union material to its employees (R. 27, n. 4; 113-114, 118-120). This avenue of communication, like distribution at company entrances or anywhere else off plant property, was, of course, available to the employees under the company rule.

of the Act (R. 28).³ The Board, one member dissenting, reversed the trial examiner in this respect (R. 59, 63). The Board noted that the anti-union literature distributed by NuTone was protected by Section 8 (c) of the Act, which guarantees the right to express and disseminate views, arguments and opinions in oral or printed form so long as they do not contain threats of reprisal or promises of benefit (R. 59). The Board held further that an employer's right to promulgate and enforce valid rules regulating the conduct of his employees may not be conditioned on the requirement that management itself be bound by such rules (*ibid.*). Finally, the Board concluded that the statutory protection accorded NuTone's dissemination of its non-coercive views was not forfeited because it engaged in other unfair labor practices for which a remedy had been provided (R. 60). See p. 2, *supra*.

II.

THE DECISION OF THE COURT BELOW

The Court of Appeals, affirming in other respects the Board's findings of unfair labor practice and its remedial order (App., *infra*, pp. 24-25), disagreed with

³ The trial examiner found further support for his finding of discrimination in the circumstance that, after the defeat of the Steelworkers in the August 19 election and the elimination of that union as a contender for the status of bargaining representative of the employees, NuTone unlawfully assisted the NuTone Employee-Company Relations Committee by, *inter alia*, permitting and assisting it to distribute literature on plant property (R. 27, 28; 111, 121). As indicated above, p. 2, the Board found that this unlawful assistance was in and of itself a violation of the Act and directed its cessation (R. 60, 61, 62).

the Board's conclusions on the subject of the no-distribution rule (App., *infra*, pp. 15-24). Characterizing that issue as "a close and difficult one," the court observed that its resolution turned on "the interplay of several rights, some statutory and some inherent" (App., *infra*, pp. 15, 16). The court acknowledged that these several rights—the Section 7 right of employees to engage in organizational activities free of unlawful interference; the employer's right, protected by Section 8 (c), to express and disseminate non-coercive views and opinions; the right of free speech; and the inherent right of employers to maintain production, order, and discipline in their establishments—sometimes conflict and that the resolution of such conflict is the core of the problem in the instant case (*ibid.*).

Putting aside, at the outset, the impact of Section 8 (c), the court below first considered the problem of accommodating the Section 7 right of employees to organize and the countervailing right of employers to maintain production, order, and discipline. It concluded, in accord with prevailing authority, that "absent special circumstances, discrimination, or a specific purpose to suppress self-organization," no-solicitation rules are valid as to working time because of the obvious employer interest in maintaining production, and that, in the interest of keeping the plant clean and orderly, no-distribution rules are valid even as to non-working time (App., *infra*, pp. 16-18). The court noted that, indeed, there was "no dispute concerning the general validity of a broad no-distribution rule like the one in effect at NuTone." But since the justification for such a rule was the employer's

interest in order and discipline, the court concluded that NuTone's action in distributing its own literature, while contemporaneously prohibiting the employees from doing the same thing, vitiated the reason for the rule and rendered the rule invalid (App., *infra*, pp. 19-21).

The court below recognized that Section 8 (c) was open to a construction which would invalidate the above conclusion. That section, as the court noted, expressly provides that the dissemination of non-coercive views, argument, or opinion "shall not constitute or be evidence of an unfair labor practice * * *." Hence, the argument runs, to condition the employer's right to disseminate his views by compelling him to forfeit his otherwise valid rule against employee distribution would dilute the guarantee which Section 8 (c) was designed to provide (App., *infra*, pp. 21-23). This was the view, the court below acknowledged, taken by the Court of Appeals for the Sixth Circuit in *National Labor Relations Board v. F. W. Woolworth Co.*, 214 F. 2d 78, and by Judge Swan dissenting in *Bonwit Teller, Inc. v. National Labor Relations Board*, 197 F. 2d 640, 646 (C. A. 2), certiorari denied, 345 U. S. 905 (App., *infra*, p. 23). Unable to agree, however, the court below decided that while Section 8 (c) "wipes out the taint of discrimination which might attach to a speech by an employer favoring one union as against another, or against any and all unions," and also "wipes out the obligation of an employer to afford affirmatively to his employees equal opportunity with himself to distribute or to solicit," it "does not wipe

out the basic rule that in order to enforce a no-distribution rule against employees, the employer must have a valid reason" (App., *infra*, p. 23). Accordingly, the court concluded that NuTone was guilty of an unfair labor practice when it prohibited its employees from distributing organizational literature on company property during non-working hours and directed that the Board modify its order in conformity with the court's opinion (App., *infra*, p. 24).

REASONS FOR GRANTING THE WRIT

1. In holding that, notwithstanding the broad immunity granted by Section 8 (c) of the Act, the employer's dissemination of non-coercive views may vitiate otherwise valid no-solicitation and no-distribution rules, the court below acknowledges that it is in conflict with the view taken by the Sixth Circuit in *National Labor Relations Board v. F. W. Woolworth Co.*, 214 F. 2d 78 (C. A. 6), and with the dissenting opinion of Judge Swan in *Bonwit Teller, Inc. v. National Labor Relations Board*, 197 F. 2d 640, 646 (C. A. 2), certiorari denied, 345 U. S. 905. The effect of the decision below is that an employer may not simultaneously exercise his unfettered right under Section 8 (c) to express his non-coercive opinions and his right, also well settled, to limit employee solicitation and distribution in the plant. The contrary view, set forth in *Woolworth*, preserves both rights.

Questions as to the permissible scope and application of plant rules forbidding employees to engage in union solicitation or distribution of union literature

were considered by this Court in the companion cases, *Republic Aviation Corp. v. National Labor Relations Board* and *National Labor Relations Board v. LeTourneau Company of Georgia*, 324 U. S. 793.¹ However, in those cases, the Court dealt with the problem merely on the basis of "an adjustment between the undisputed right of self-organization assured to employees under the * * * Act and the equally undisputed right of employers to maintain discipline in their establishments." 324 U. S. at 797-798. The Court did not have before it the issue raised here, namely, whether enforcement against employees of no-distribution (and, by analogy, no-solicitation) rules, valid under the *Republic* and *LeTourneau* test, becomes an unfair labor practice if the employer is himself disseminating his own non-coercive views concerning unionization. As the court below pointed out (App., *infra*, pp. 15, 16, 24), that issue represents a "close and difficult" question of statutory interpretation, involving not only the Section 7 right of employees to organize and the countervailing right of employers to maintain order and discipline in their establishments—matters considered by this Court in *Republic* and *LeTourneau*—but also the scope of the immunity conferred by Section 8 (c). As in *Republic* and *LeTourneau*, the problem of accommodating these conflicting rights invites resolution by this Court.

2. The legal issue presented by this case arises out of the employer's application of a no-distribution rule.

¹ See also *National Labor Relations Board v. Babcock & Wilcox Co.*, 351 U. S. 105, where the question at issue was the validity of a rule banning non-employee distribution of literature on plant property.

But, as the opinions of the Board and of the court below recognize, the same essential problem is present in cases involving the application of no-solicitation rules. See *Livingston Shirt Corporation*, 107 NLRB 400.⁵ The ruling below is thus significant for very substantial numbers of employers and employees in their day-to-day relations. We believe that the public importance of the question in the administration of the Act is clear.

CONCLUSION

The decision below is in conflict with a decision of the Sixth Circuit and presents a question which is of

⁵In that case, the employer had in effect a valid rule enjoining activities for or against a union during working hours. During a pre-election period, the employer made non-coercive, anti-union speeches to the employees during working hours, but denied the union the use of its premises for a reply. The Board rejected the claim that, in the circumstances, the employer was under an obligation to give the union an opportunity to address the employees on the plant premises.

substantial public importance. This petition for a writ of certiorari should therefore be granted.

Respectfully submitted,

J. LEE RANKIN,
Solicitor General.

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General Counsel,

STEPHEN LEONARD,

Associate General Counsel,

DOMINICK L. MANOLI,

Assistant General Counsel,

ARNOLD ORDMAN,

Attorney;

National Labor Relations Board.

FEBRUARY 1957.

* As noted in the text, the Board's position, although rejected by the Court of Appeals for the District of Columbia Circuit in the instant case, is supported by the Sixth Circuit's decision in the *Woolworth* case. The Board has indicated that it intends to adhere to its present position unless and until the contrary views expressed in the decision below should be definitively accepted. In these circumstances, the Solicitor General, while not taking any position at this time as to the relative merits of the respective views of the statute adopted by the court below and by the Court of Appeals for the Sixth Circuit, believes that resolution of the conflict by this Court would be desirable for the guidance of the Board and all others concerned. Accordingly, in order to accomplish this objective which seems plainly in the public interest, this petition for certiorari is being filed.

APPENDIX

1. OPINION OF COURT OF APPEALS

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 12754

UNITED STEELWORKERS OF AMERICA, CIO, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

NUTONE, INCORPORATED, INTERVENOR

No. 12812

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

NUTONE, INCORPORATED, RESPONDENT

UNITED STEELWORKERS OF AMERICA, CIO, INTERVENOR

**ON PETITION TO REVIEW AND MODIFY AN ORDER OF THE
NATIONAL LABOR RELATIONS BOARD (NO. 12754) AND ON
PETITION TO ENFORCE THE ORDER (NO. 12812)**

Decided November 23, 1956

Mr. Arthur J. Goldberg, with whom *Mr. David E. Feller* was on the brief, for petitioner in No. 12754 and intervenor in No. 12812.

Mr. Arnold Ordman, Attorney, National Labor Relations Board, of the bar of the Supreme Judicial

Court of Massachusetts, *pro hac vice*, by special leave of Court, with whom *Mr. Marcel Mallet-Prevost*, Assistant General Counsel, National Labor Relations Board, was on the brief, for respondent in No. 12754, and petitioner in No. 12812. *Miss Fannie M. Boyls* also entered an appearance for respondent in No. 12754 and petitioner in No. 12812.

Mr. Charles A. Atwood for intervenor in No. 12754 and respondent in No. 12812. *Mr. Thomas E. Shroyer* also entered an appearance for intervenor in No. 12754 and respondent in No. 12812.

Before PRETTYMAN, WILBUR K. MILLER, and BASTIAN,
Circuit Judges

PRETTYMAN, *Circuit Judge*. These two cases come here from the National Labor Relations Board. The United Steelworkers of America began in the spring of 1953 a campaign to organize the employees of Nutone, Incorporated, a manufacturing concern of Cincinnati, Ohio. The campaign was heated but not violent. The ensuing election was lost by the Steelworkers, and shortly thereafter an unaffiliated union was formed in the plant. The Steelworkers filed with the Labor Board charges against Nutone, a complaint was issued, hearing was held, and a trial examiner's report and recommended order were issued. Exceptions were filed, and the Board adopted the examiner's conclusions in part and rejected them on one issue. The Steelworkers petitioned this court for review (No. 12754), and the Board petitioned for an enforcement order (No. 12812).

Upon the prehearing conference held in this court the issues in the two cases were phrased by stipulation made by the parties. We turn first to the *Steelworkers* case. The two issues there concern the denial of reinstatement and back pay to an employee named.

Virgie Marshall and the enforcement by the employer of a no-distribution rule against the union while it (the employer) distributed anti-union literature.

While the organization campaign was in progress a temporary layoff due to economic conditions occurred. Virgie Marshall was among the employees laid off. She was a pro-union advocate and, according to the record, possessed an unusual talent for vivid oral expression. She directed this talent at fellow workers outside the plant. The examiner said the witnesses attributed to her "vile and obscene statements, as well as cursing and profanity." References to the record indicate that his description was pallid. He recommended against requiring her reinstatement. Recognizing that "in the realities of industrial life, particularly where vital issues are at stake during a strike or an organizing campaign, employees frequently express their sentiments in crude and vulgar language, not suited either to the pleasantries of the drawing room or to the courtesies of parliamentary disputation", the examiner was nevertheless of opinion there are limits to permissible verbal assault. He thought there are bounds of language beyond which an employee may not go and still retain his or her right to reinstatement. The Board agreed with the examiner. We have no difficulty in agreeing with the examiner and the Board on the point.¹ Perhaps such boundaries are far-flung, but wherever the line is drawn it will fail to encompass as permissible the language used by Virgie Marshall. The Board's power is to take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of the Act.² The

¹ See *National Labor Rel. Bd. v. Longview Furniture Co.*, 206 F. 2d 274 (4th Cir. 1953).

² 61 Stat. 147 (1947), 29 U. S. C. A. § 160 (c).

basic policy of the Act is industrial peace. The Board is justified in believing that there is language which, when applied directly and personally to fellow workers, is disruptive of that peace and tends to preclude settlement of disputes.

The second issue is a close and difficult one. The company, prior to and during the organization campaign, had and enforced rules forbidding employees to engage in solicitation of any kind on company time or to distribute on company property any literature or to post thereon any signs. The company itself, however, regularly posted signs and distributed literature on its property. During the campaign the company enforced uniformly the no-solicitation and no-distribution rules against both groups of contending employees, but it did not deem itself bound by these rules and distributed on its property eight pieces of anti-union but non-coercive literature.

The issue before us, as stipulated by the parties, is: Whether an employer commits an unfair labor practice if, during a pre-election period, it enforces an otherwise valid rule against employee distribution of union literature in the plant, while, during that same period, itself distributing non-coercive anti-union literature within the plant in a context of other unfair labor practices, committed prior to the election period and thereafter.

This stipulation of the issue is, we may safely assume, precisely drawn. The issue is not the naked question whether the employer commits an unfair labor practice by distributing his own literature. Neither is it the naked question whether the employer commits an unfair labor practice when he enforces a no-distribution rule against his employees. The issue is whether it is an unfair labor practice for the employer to do both things at the same time, i. e., simul-

taneously distribute his own literature and prohibit his employees from distributing theirs. Thus the problem is not the application of any single provision of the statute but involves the interplay of several rights, some statutory and some inherent. Section 7 of the Act³ gives employees the right to organize. Section 8 (a) (1)⁴ protects that right by making it an unfair labor practice for an employer to interfere with his employees in their exercise of the right. Section 8 (e)⁵ provides that the dissemination of views in writing shall not constitute an unfair labor practice, if such expression contains no threat of reprisal or force or promise of benefit. Both employer and employees have rights of free speech. The employer has certain other inherent rights, such as the rights to production, to orderly conduct, and to cleanliness and order on his property. Sometimes these several rights conflict.⁶ We have such a problem here.

We first explore the situation presented by general considerations, absent subsection (e) of Section 8 of the Act. Except for the effect of legislation, and particularly Sections 7 and 8 (a) (1) of this Act, an employer's power to make rules governing employee organizational activities on company premises would be largely unlimited. Absent legislation he could promulgate and enforce rules prohibiting employees from soliciting in favor of a union or distributing union literature on the premises, solely because he was opposed to employee organization. The prerequisites of possession or ownership shielded any anti-union pur-

³ 49 Stat. 452 (1935), as amended, 29 U. S. C. A. § 157.

⁴ 49 Stat. 452 (1935), as amended, 29 U. S. C. A. § 158 (a) (1).

⁵ 61 Stat. 142 (1947), 29 U. S. C. A. § 158 (e).

⁶ E. g., *Republic Aviation Corp. v. Board*, 324 U. S. 793, 89 L. Ed. 1372, 65 S. Ct. 982 (1945); *Labor Board v. Babcock & Wilcox Co.*, 351 U. S. 105, 100 L. Ed. —, 75 S. Ct. 679 (1956).

pose behind the employer's rules, just as liberty of contract shielded anti-union conditions on employment or discharge for union affiliations and activity. Under the statute, however, employees have a right to organize and to engage in activities in aid of organization. That is a broad and strong right, although it is not without limits. It does not take precedence over the right of an employer to conduct his business in a reasonable manner and with reasonable prospects of success. But the property rights of an employer do not, as a general principle, justify restrictions on self-organization not reasonably related to the conduct of the enterprise in which he is engaged. Just as discharge of a union adherent is justified if there is "cause" for the employer's action,¹ so too there must be "cause" for limitation of employee organizational activities.² The Supreme Court recently made this clear, saying, with respect to the rights of employees on company premises, "No restriction may be placed on the employees' right to discuss self-organization among themselves, unless the employer can demonstrate that a restriction is necessary to maintain production or discipline."³

¹ See 61 Stat. 147 (1947), 29 U. S. C. A. § 160 (c).

² Even where there is some valid purpose relating to production or discipline, the limitation may have so great an effect on employee rights that some disruption of the employer's usual freedom of action may be deemed necessary. See, e.g., *Bonwit Teller, Inc. v. National Labor Relations Bd.*, 197 F. 2d 640 (2d Cir. 1952), cert. denied, 345 U. S. 905, 97 L. Ed. 1342, 73 S. Ct. 644 (1953).

³ *Labor Board v. Babcock & Wilcox Co.*, 351 U. S. 105, 113, 100 L. Ed. —, 76 S. Ct. 679 (1956). See also *National Labor Relation Board v. Seampufie, Inc.*, 222 F. 2d 858 (10th Cir. 1955), aff'd, 351 U. S. 105, 100 L. Ed. —, 76 S. Ct. 679 (1956); *Maryland Drydock Co. v. National Labor Rel. Bd.*, 187 F. 2d 538 (4th Cir. 1950); *National Labor Relations Bd. v. American Furnace Co.*, 158 F. 2d 376 (7th Cir. 1946); *National Labor Relations Bd. v. American Pearl Button Co.*, 149 F. 2d 258 (8th Cir. 1945).

It is well established that no-solicitation rules are valid as to working time because of the obvious interest in maintaining productive activity; and that they are valid as to non-working time in certain establishments such as department stores because of the peculiar circumstances of the business.¹⁰ But, where such circumstances do not exist and rules restricting solicitation are applied to non-working time, they are generally invalid as to employee activities.¹¹

No-distribution rules have had a checkered history. At one time the Board held that in the interests of keeping the plant clean and orderly it was not unreasonable for an employer to prohibit the distribution of literature on plant premises at all times.¹² Later the Board took the position that, absent a particular showing that the rule was necessary to plant discipline, an employer could not validly apply such a rule to employees on non-working time.¹³ Finally, in *Monolith Portland Cement Company*,¹⁴ the Board held that a non-distribution rule relating to the plant proper could be applied generally to non-working time, absent special circumstances, discrimination, or a specific purpose to suppress self-organization.

Our attention has not been called to any case under the Wagner Act or its successor in which it has been

¹⁰ *National Labor Rel. Bd. v. May Department Stores Co.*, 154 F. 2d 533 (8th Cir. 1946), cert. denied, 329 U. S. 725, 91 L. Ed. 627, 67 S. Ct. 72 (1946). See also *Marshall Field & Co. v. National Labor Relations Bd.*, 200 F. 2d 375 (7th Cir. 1952).

¹¹ See *R. public Aviation Corp. v. Board*, 324 U. S. 793, 89 L. Ed. 1372, 65 S. Ct. 982 (1945); *National Labor Relations Board v. Clark Bros. Co.*, 163 F. 2d 373 (2d Cir. 1947); *National Labor Rel. Board v. Glenn L. Martin-Nebraska Co.*, 141 F. 2d 371 (8th Cir. 1944).

¹² *Tabin-Picker & Co.*, 50 NLRB 928 (1943).

¹³ *American Book-Stratford Press, Inc.*, 80 NLRB 914 (1948).

¹⁴ 94 NLRB 1358 (1951).

held that an employer can prohibit either solicitation or distribution of literature by employees¹⁵ simply because the premises are company property.¹⁶ Employees are lawfully within the plant, and non-working time is their own time. If Section 7 activities are to be prohibited, something more than mere ownership and control must be shown.

In the instant case no question is raised concerning the rule barring solicitation on company property. Nor is there any dispute concerning the general validity of a broad no-distribution rule like the one in effect at Nutone. However the justification for a broad no-distribution rule by an employer is the need for keeping the plant clean and orderly or the need to maintain discipline. And so Steelworkers argue that, if the company itself undertakes to distribute literature at approximately the same time that it prohibits employees from doing the same thing, the reason for the no-distribution rule is vitiated. They say that, if a rule must have a reason in fact to support it, a rule demonstrably without a reason is invalid. The argument, premised upon Section 7 of the Act, and ignoring for the moment subsection 8(e), is supported by the authorities, as we have indicated. Employees have no right to use their employer's premises to urge a political cause, to support a charity, or to promote programs alien to the right of self-organization; but they do have a right to engage in Section 7 activities, and that right must be given effect unless

¹⁵ Cf. *Labor Board v. Babcock & Wilcox Co.*, 351 U. S. 105, 100 L. Ed. ——, 76 S. Ct. 679 (1956).

¹⁶ In *Midland Steel Products Co. v. National Labor R. Bd.*, 113 F. 2d 800 (6th Cir. 1940), the court held that an employer could prohibit solicitation on company property at all times because of controversies and animosities likely to be aroused among employees.

there is some valid reason to the contrary relating to production or discipline.

Thus we come to the next phase of the problem. Does the fact that the employer distributes literature on the plant property demonstrate that there is no valid reason (in cleanliness, order, production, discipline, etc.) for prohibiting distribution? If the employer himself distributes literature in the plant, how can he validly assert that the distribution of literature would litter the property, distract attention from production, or instigate argument to the disruption of discipline? When the employer strips himself of the reason for his objection, does he not thereby lose the right to object?

In respect to distribution no one seems to dispute the right of an employer to impose upon his employees any and all restrictions, limitations, conditions, etc., which he imposes upon himself. These may relate to amounts, times, places, nature, and all the terms which may be imposed to protect order, cleanliness, production and discipline. The question is whether the employer, by distributing under certain conditions or restrictions, thereby negatives the reason for prohibiting distribution under precisely those same conditions and restrictions.

This part of the problem is a matter of realism and common sense. It seems to us unrealistic to say that, if an employer distributes certain amounts of literature at certain places at certain times, he can nevertheless claim that the distribution of the same quantity of literature at the same places and at the same or similar times would be disruptive of order or cleanliness. This is one of the keys to the ultimate conclusion in the problem before us, but it is not susceptible of extended explanation or discussion. We think that, if an employer distributes literature

in certain amounts under certain conditions, he cannot be heard to say that such distribution is a detriment to his operation; *i. e.*, such a detriment as will support a restriction upon Section 7 rights of employees. It follows from *Labor Board v. Babcock & Wilcox Co.*¹⁷ and cases there cited that, being without a reason for a rule, he is not entitled to a rule of no-distribution.

But it is argued that to hold that an employer may not prohibit employee distribution if he himself distributes is to impose a condition upon the employer's right to distribute. It is said that the holding would be equivalent to holding that an employer cannot distribute unless he permits employee distribution under similar conditions. And that argument brings us face to face with subsection (e) of Section 8 of the Act. Section 8 relates to unfair labor practices, and subsection (e) is:

The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this subchapter, if such expression contains no threat of reprisal or force or promise of benefit.

Interpretation of this subsection has given rise to many difficulties,¹⁸ but we need not venture too far

¹⁷ *Supra* note 15.

¹⁸ Bonwit Teller, Inc., 96 NLRB 608 (1951), *enforcement denied*, 197 F. 2d 640 (2d Cir. 1952), *cert. denied*, 345 U. S. 905, 97 L. Ed. 1342, 73 S. Ct. 644 (1953); Livingston Shirt Corporation, 107 NLRB 400 (1953); *National Labor Relations Bd. v. F. W. Woolworth Co.*, 214 F. 2d 78 (6th Cir. 1954). And see Note, *Limitations upon an Employer's Right of Noncoercive Free Speech*, 38 Va. L. Rev. 1037 (1952); Note, *The Coercive Character of Employer Speech: Context and Setting*, 43 Geo. L. J. 405 (1955).

into the discussions in those cases. One view is that the subsection is absolute, the argument being that Congress was aware of the problem when it inserted this subsection in the statute in 1947. The *Republic Aviation* case¹⁹ had been decided in 1945, and the Supreme Court had described the case (and its companion case, *National Labor Relations Board v. Le Tourneau Company of Georgia*) in the following language: "These cases bring here for review the action of the National Labor Relations Board in working out an adjustment between the undisputed right of self-organization assured to employees under the Wagner Act and the equally undisputed right of employers to maintain discipline in their establishments."²⁰ The Senate Report on the proposed subsection²¹ specifically referred to the restriction placed by the Board upon the decision in *Thomas v. Collins*²² and said that it believed the Board's decision in *Clark Bros. Co., Inc.*,²³ to be too restrictive. If Congress, with the general problem thus before it, had intended that the dissemination of views be subject to other limitations, it would have said so. The subsection says flatly that the dissemination of views in written form shall not constitute an unfair labor practice if the expression contains no threat of reprisal or promise of benefit. It contains no other condition or limitation. To say the subsection means that such distribution shall not constitute an unfair labor practice when, as, and if it is coupled with permission to employees to distribute would be to write into the statute a con-

¹⁹ *Republic Aviation Corp. v. Board*, 324 U. S. 793, 89 L. Ed. 1372, 65 S. Ct. 982 (1945).

²⁰ 324 U. S. at 797-798.

²¹ S. Rep. No. 105, 80th Cong., 1st Sess. 23-24 (1947).

²² 323 U. S. 516, 89 L. Ed. 430, 65 S. Ct. 315 (1945).

²³ 70 NLRB 802 (1946), *enforcement granted*, 163 F. 2d 373 (2d Cir. 1947).

dition not there. The foregoing is the course of one side of the debate.

The other view is that the subsection undoubtedly wipes out the taint of discrimination which might attach to a speech by an employer favoring one union as against another, or against any and all unions, and which might thus be illegal as unfair.²⁴ It wipes out the obligation of an employer to afford affirmatively to his employees equal opportunity with himself to distribute or to solicit. But it does not wipe out the basic rule that in order to enforce a no-distribution rule against employees the employer must have a valid reason.

The former of the foregoing views is the one taken by the Court of Appeals for the Sixth Circuit in the *Woolworth* case²⁵, and by Judge Swan dissenting in *Bonwit Teller*.²⁶ With the utmost deference to those authorities we find ourselves in disagreement with them. We think the latter of the two views above described is correct.

We suppose everyone would agree that the question is a close and elusive one. Indeed the answer might almost seem to depend upon the way in which the question is put. If we ask, "May an employer distribute noncoercive literature on plant property if he does not also permit employees to do the same thing?", the answer might seem to be, under subsection (e), "Yes." But that is not the question here. The question is: May an employer prohibit employees from distributing literature on plant property if he has by his own action demonstrated the absence of a valid

²⁴ See, e. g., *National Labor Relations Bd. v. American Furnace Co.*, 158 F. 2d 376 (7th Cir. 1946).

²⁵ *National Labor Relations Bd. v. F. W. Woolworth Co.*, 214 F. 2d 78 (6th Cir. 1954).

²⁶ *Supra* note 8, 197 F. 2d at 646.

reason for such a prohibition? And the answer to that question must be: He may not.

We think the conclusion we reach does not write an improper restriction upon a statutory provision not so restricted in terms. Section 8 of the Act flatly prohibits an employer from interfering with the organizational activities of his employees. But the Board and the courts have held that he may interfere with those activities for reasons which he finds in the needs of production, order, cleanliness or discipline. That permission to him is not in the statute in terms. It was a recognition by the enforcing authorities of inherent rights on the part of the employer. It takes no amendment to the statute to say that, when this permission, engrafted upon the statute, is not applicable to a given employer, the unrestricted prohibition of the statute against interference with employee activities comes into play. The statute itself is not thereby amended; it thereby comes into literal effect.

We are fully aware of the restrictions upon judicial review of Board findings and orders, but the present case concerns statutory interpretation and clearly falls within the competence of the court to rule upon the questions presented.

We conclude that the employer here, Nutone, Incorporated, was guilty of an unfair labor practice when it prohibited its employees from distributing organizational literature on company property during non-working hours. The Board's conclusion to the contrary must be set aside and the case remanded with directions to modify paragraph (e) of the order so as to require Nutone to cease and desist from enforcing its no-solicitation and no-distribution rules in a manner inconsistent with this opinion.

This brings us to the case brought here by the Board for enforcement of its order and Nutone's answer to the Board's petition. The questions, as stipulated,

concern the sufficiency of the evidence to support three findings by the Board: (1) that Nutone violated Section 8 (a) (1) by certain actions toward employees in respect to union activities; (2) that Nutone's failure to recall certain employees after an economic layoff was because of union activity; and (3) that a certain employee (Puckett) did not so conduct herself as to render her unsuitable for reinstatement. We have examined the evidence from which the Board derived these findings and think it is substantial. The portions of the Board's order based upon these findings will be affirmed.

Upon the foregoing bases the order of the Board must be modified as indicated in this opinion and, as so modified, will be enforced.

2. JUDGMENT BELOW

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

OCTOBER TERM, 1956

No. 12754

UNITED STEELWORKERS OF AMERICA, CIO, PETITIONER

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UNITED STEELWORKERS OF AMERICA, CIO, INTERVENOR

On Petition to Review and Modify an Order of the National Labor Relations Board (No. 12754) and on Petition to Enforce the Order (No. 12812).

Before: PRETTYMAN, WILBUR K. MILLER and
BASTIAN, Circuit Judges.

ORDER AND DECREE

These cases came on to be heard on the record from the National Labor Relations Board, and were argued by counsel.

ON CONSIDERATION WHEREOF, it is ordered and decreed by this Court:

- (1) that these cases be, and they are hereby, remanded to the National Labor Relations Board with directions to modify paragraph (e) of the order involved herein in conformity with the opinion of this Court;
- (2) that for the foregoing purpose the Clerk be, and he is hereby, directed to issue forthwith to the National Labor Relations Board a certified copy of this order and decree;
- (3) that the order of the National Labor Relations Board, as so modified, be enforced;
- (4) that within ten days herefrom the Board shall file a supplemental record containing its order modifying paragraph (e) of its order herein in conformity with the opinion of this Court, and shall also submit, in accordance with Rule 38, (b) of this Court, a proposed enforcement decree.

Dated: NOVEMBER 23, 1956.

Per *Circuit Judge PRETTYMAN*.

3. STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C., 151, *et seq.*), are as follows:

RIGHTS OF EMPLOYEES

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through

representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a) (3).

UNFAIR LABOR PRACTICES

SEC. 8. (a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

(2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it:

* * * * *

(e) The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit.

* * * * *

PREVENTION OF UNFAIR LABOR PRACTICES

SEC. 10. * * *

(e) The Board shall have power to petition any circuit court of appeals of the United States (including the United States Court of Appeals for the District of Columbia), or if all the circuit courts of appeals to which application may be made are in vacation, any district court of the United States (including the District Court of the United States for the District of Columbia), within any circuit or dis-

trict, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceedings, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. * * *

(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any circuit court of appeals of the United States in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith served upon the Board, and

thereupon the aggrieved party shall file in the court a transcript of the entire record in the proceeding, certified by the Board, including the pleading and testimony upon which the order complained of was entered, and the findings and order of the Board. Upon such filing, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e), and shall have the same exclusive jurisdiction to grant to the Board such temporary relief, or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

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In the Supreme Court of the United States

OCTOBER TERM, 1957

No. 81

NATIONAL LABOR RELATIONS BOARD, PETITIONER
v.

UNITED STEELWORKERS OF AMERICA, CIO,¹ AND
NUTONE, INCORPORATED

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

OPINIONS BELOW

The opinion of the court below (R. 99-110) is reported at 243 F. 2d 593. The findings, conclusions, and order of the Board (R. 11-54) are reported at 112 NLRB 1153.

JURISDICTION

The judgment of the court below (R. 110) was entered on November 23, 1956. The petition for writ of certiorari was granted on April 1, 1957. 353 U. S. 921. The jurisdiction of this Court rests on 28 U. S. C. 1254 and under Section 10 (e) and (f) of the National Labor Relations Act, as amended.

¹ Now properly United Steelworkers of America, AFL-CIO, as a result of the merger of the two parent federations in December 1955.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C. 151, *et seq.*) are reprinted in the Appendix, *infra*, p. 45.

QUESTION PRESENTED

Whether a rule prohibiting employees from distributing literature in the employer's plant, otherwise valid under the tests enunciated by this Court, becomes invalid if the employer, himself, is distributing literature setting forth his own non-coercive views concerning unionization.

STATEMENT

Following the customary proceedings under Section 10 of the Act, the Board found that the employer, NuTone, Incorporated, had engaged in a number of unfair labor practices against its employees, including unlawful interference with their organizational rights, discriminatory refusal to reinstate certain employees after an economic layoff, and unlawful assistance and support to an organization of its employees known as the NuTone Employee-Company Relations Committee (R. 44-45, 46-47). The Board prescribed appropriate remedial relief for these violations (R. 47-48). However, the Board, one member dissenting, dismissed an allegation that NuTone had committed a further violation of the Act by discriminatorily enforcing a plant rule against employee distribution of literature in the plant (R. 45-46, 49-51). The court below, while generally affirming the Board's findings and order, reversed the Board with respect to its ruling on the no-distribution rule. Since the validity of this reversal

is the sole question presented in this case, we set forth only the findings and conclusions relevant to that question.

I. THE BOARD'S FINDINGS AND CONCLUSIONS

NuTone, a New York corporation, operates a plant located on a public street in Cincinnati, Ohio, where it manufactures door chimes, fans, heaters and other electrical devices (R. 12). In the summer of 1953, United Steelworkers of America, CIO, engaged in an organizational campaign among NuTone's employees preparatory to a Board election scheduled for August 19, 1953 (R. 12). Prior to and during the organizational campaign NuTone had in effect rules forbidding its employees to engage in solicitation of any kind on company time, to post signs of any kind or to distribute any literature on company property (R. 17-18). However, NuTone itself regularly posted signs throughout the plant and distributed literature both for its own purposes and for charitable purposes or drives such as Community Chest (R. 18-19, 57, 58, 59).

When the Steelworkers' campaign got under way, NuTone posted notices reminding its employees of the foregoing rules and stating that the rules applied equally to pro-union and anti-union employee groups (R. 17-18, 58-59, 60-61). During the preelection period, the rules were uniformly applied to those employees who favored the Steelworkers and to those who opposed the Steelworkers (R. 18).

Management, however, consistent with its prior practice, did not deem itself bound by the rules which were directed to its employees, and itself distributed

to the employees in the plant eight pieces of pre-election literature (R. 18-19, 62-64, 77-80).¹ This literature, while anti-union, was free of threat of reprisal or force, or promise of benefit (*ibid.*).

The parties to the Board proceeding did not challenge the company rules relating to solicitation and distribution and both the trial examiner and the Board affirmed their legality (R. 19-20, 45).² The trial examiner was of the view, however, that the ban on employee distribution of literature in the plant likewise precluded management from utilizing that medium of communication, and that NuTone's distribution of anti-union literature in the plant, even though the content of that literature was not coercive, constituted a discriminatory application of the no-distribution rule, in violation of Section 8 (a) (2)

¹ During the same period NuTone used the mails to send ten other pieces of non-coercive anti-union material to its employees (R. 19, 61, 64-65, 89-96). This avenue of communication like distribution at company entrances was, of course, available to the employees under the company rule.

² Notwithstanding that literal application of the rules precluded distribution of literature on the Company parking lot situated adjacent to the plant, the complaint did not allege, nor have the parties at any time claimed, invalidity of the rules on that basis. The Trial Examiner found that the rules were "in and of themselves" valid, and the Board, noting the absence of any exception to that finding, adopted it (R. 19, 45). Assuming that a proper exception in that regard would have resulted in a finding that the extension of the no-distribution rule to the parking lot was improper (cf. *LeTourneau Company of Georgia*, 54 NLRB 1253, 1264, 324 U. S. 793), this would not resolve the basic issue here presented, namely whether NuTone's own distribution of non-coercive literature invalidated the otherwise permissible prohibition against employee distribution on working premises.

and (1) of the Act (R. 17-20).⁴ The Board, one member dissenting, reversed the trial examiner in this respect (R. 45-46, 49). The Board noted that the anti-union literature distributed by NuTone was protected by Section 8 (c) of the Act, which guarantees the right to express and disseminate views, arguments and opinions in oral or printed form so long as they do not contain threats of reprisal or force or promises of benefit (R. 45-46). The Board held further that an employer's right to promulgate and enforce valid rules regulating the conduct of his employees may not be conditioned on the requirement that management itself be bound by such rules (*ibid.*). Finally, the Board concluded that the statutory protection accorded NuTone's dissemination of its non-coercive views was not forfeited because it engaged in other unfair labor practices for which a remedy had been provided (R. 46). See p. 2, *supra*.

II. THE DECISION OF THE COURT BELOW

The Court of Appeals, affirming in other respects the Board's findings of unfair labor practice and its remedial order (R. 109-110), disagreed with the

⁴ The trial examiner found further support for his finding of unlawful discrimination in the circumstance that, after the defeat of the Steelworkers in the August 19 election and the elimination of that Union as a contender for the status of bargaining representative of the employees, NuTone unlawfully assisted the NuTone Employee-Company Relations Committee by, *inter alia*, permitting and assisting it to distribute literature on plant property (R. 19). As indicated above, p. 2, the Board found that this unlawful assistance was in and of itself a violation of the Act and directed its cessation (R. 46-47).

Board's conclusions on the subject of the no-distribution rule (R. 101-109). Characterizing that issue as "a close and elusive one," the court observed that its resolution turned on "the interplay of several rights, some statutory and some inherent" (R. 108, 102). The court acknowledged that these several rights—the Section 7 right of employees to engage in organizational activities free of unlawful interference; the employer's right, protected by Section 8 (c), to express and disseminate non-coercive views and opinions; and the inherent right of employers to maintain production, order, and discipline in their establishments—sometimes conflict and that the resolution of such conflict was the core of the instant case (R. 102).

Putting aside, at the outset, the impact of Section 8 (c), the court below first considered the problem merely in terms of an accommodation between the Section 7 right of employees to organize and the countervailing right of employers to maintain production, order and discipline. It observed, in accord with prevailing authority, that "absent special circumstances, discrimination, or a specific purpose to suppress self-organization," plant rules against solicitation are valid as to working time because of the obvious employer interest in maintaining production, and that, in the interest of keeping the plant clean and orderly, plant rules forbidding distribution of literature are valid even as to non-working time (R. 104). The court then noted that there was no "dispute concerning the general validity of a broad no-distribution rule like the one in effect at NuTone" (R. 105). The court reasoned, however, that since the justification

for such a rule was the employer's interest in order or discipline, NuTone's own distribution of literature while contemporaneously prohibiting such distribution by employees vitiates the reason for the rule and rendered it invalid (R. 105-106).

Having reached this conclusion solely on the basis of the interplay of the Section 7 rights of employees and the employers' proprietary interests, the court below directed its attention to Section 8 (c) which, on the court's own statement, was a vital element in that interplay (R. 106-109). The court conceded that Section 8 (c) was open to a construction which would invalidate the conclusion it had reached. Thus, Section 8 (c) expressly provides that the "dissemination" of non-coercive views, argument, or opinion "shall not constitute or be evidence of an unfair labor practice under any of the provisions of the Act * * *." Hence, the argument runs, to condition the employer's right to disseminate his views by compelling him to forfeit his otherwise valid rule against employee distribution would write into Section 8 (c) a condition not placed there by Congress and would dilute the guarantee of that section (R. 107-108).

This was the point of view, the court below noted, adopted by the Court of Appeals for the Sixth Circuit in *National Labor Relations Board v. F. W. Woolworth Co.*, 214 F. 2d 78, and by Judge Swan, dissenting, in *Bonwit Teller, Inc. v. National Labor Relations Board*, 197 F. 2d 640, 646 (C. A. 2), certiorari denied, 345 U. S. 905. The court below rejected this line of reasoning, however. It held that while Section 8 (c) "wipes out the taint of discrimination which

might attach to a speech by an employer favoring one union as against another, or against any and all unions," and also "wipes out the obligation of an employer to afford affirmatively to his employees an equal opportunity with himself to distribute or solicit," it "does not wipe out the basic rule that in order to enforce a no-distribution rule against employees, the employer must have a valid reason" (R. 108). Accordingly, the court concluded that NuTone was guilty of an unfair labor practice when it prohibited its employees from distributing organizational literature on company property during non-working hours, and directed that the Board modify its order to conform to the court's opinion (R. 109).

SUMMARY OF ARGUMENT

The principles governing the right of employees to engage in union solicitation or to distribute union literature on plant property spring from "an adjustment between the undisputed right of self-organization assured to employees under the * * * Act and the equally undisputed right of employers to maintain discipline in their establishments." *National Labor Relations Board v. LeTourneau Company of Georgia*, 324 U. S. 793, 797-798. One of these principles, directly involved here, is that absent special circumstances or discriminatory motivation, an employer may make and enforce a broad rule prohibiting his employees from distributing literature in his plant at any time. The question presented for review in this case is whether such a rule, concededly valid on its face, becomes invalid and an unfair labor practice if

the employer contemporaneously utilizes the plant premises to distribute his own non-coercive literature concerning unionization. Resolution of this question, posed before this Court for the first time, calls for a reexamination of the nature of the conflicting employer-employee rights and the principles governing their accommodation, and calls also for an appraisal of the impact of Section 8 (e) of the Act which provides, *inter alia*, that the dissemination of non-coercive views, argument, or opinion "shall not constitute or be evidence of an unfair labor practice * * *."

A. In *National Labor Relations Board v. Babcock & Wilcox Company*, 351 U. S. 105, this Court pointed out that in formulating the principles governing employee solicitation and distribution of literature on plant premises, the respective employer and employee rights should be scrupulously observed. "Accommodation between the two must be obtained with as little destruction of the one as is consistent with the maintenance of the other" (at 112). The differing scope of the permissible rules respecting solicitation on the one hand and distribution of literature on the other reflects the application of this limiting criterion. Thus, the well-settled rule respecting solicitation is that an employer may in the normal situation forbid his employees to engage in union solicitation during working time, but that a broad prohibition banning union solicitation during non-working time is invalid. With respect to distribution of literature, however, the well-settled rule is that absent special circumstances a prohibition against employee distribution in the plant may lawfully encompass even non-working time. Implicit

in the rule governing solicitation is the premise that absent some inroad on the employer's otherwise exclusive control over his property, the employees' right to self-organization through the medium of solicitation would be substantially frustrated. Conversely, the underlying premise of the rule governing distribution is that adequate protection of the employees' organizational rights in that regard can be maintained without any corresponding impairment of the employer's property right.

This distinction flows from the fact that solicitation and distribution of literature are different organizational techniques and pose different problems for the employer and for the employees. The rights and interests of both enter into the accommodations reached. Heretofore, the difference in the scope of the respective rules has been explained largely in terms of employer interests. Thus, it has been noted that solicitation, being oral in nature, impinges upon the employer's interests only to the extent that it occurs on working time, whereas distribution of literature, because it carries the potential of littering the plant, raises a hazard to production even if it occurs on non-working time.

This consideration, though valid, presents only one side of the employer-employee equation and does not wholly explain the accommodations reached. For example, if the employer interests alone were controlling, a blanket proscription on employee solicitation in the plant could be justified, and the rule respecting distribution might likewise take a different form. Accord-

ingly, the employee interests involved in the respective situations must also be considered.

From the standpoint of employee interests, the drawbacks to effective solicitation when employees are away from the plant and engaged in their other varied activities has compelled the conclusion that the plant itself is uniquely appropriate for that purpose and that unless solicitation were allowed there at least during non-working time, the employees' right to utilize that medium of organization would be virtually nullified. Distribution of literature does not present that problem. The distinguishing characteristic of literature, as contrasted with oral solicitation, is that its message is reduced to permanent form and its purpose is satisfied so long as adequate opportunity exists for its distribution. For example, literature can be distributed to employees as readily when they enter or leave the plant as when they are in the plant. It is this consideration coupled with the employer's natural interest in keeping disorder in the plant to a minimum which differentiates distribution from solicitation. And since adequate avenues exist for employee distribution of literature outside the plant, there is no occasion for the employer to surrender his property right in the plant itself to provide still another avenue.

The court below overlooked this critical consideration when it assumed that "littering" was the sole reason for the no-distribution rule and that the employer by himself distributing literature in the plant vitiated the reason for the rule. A reason of at least equal importance is that adequate avenues outside the

plant are available for employee distribution. The employer's utilization of his premises for distribution of his own literature does not interfere with the employees' use of those avenues. Accordingly, since the employees' statutory right of self-organization in that regard is fully maintained, no destruction of the employer's property right is required.

B. As the court below recognized, Section 8 (e), which provides that the expression or dissemination of non-coercive views, argument, or opinion shall not constitute or be evidence of an unfair labor practice, is directly relevant here. The text and legislative history of that Section reveal that Congress disapproved of the Board's early view that the mere airing by an employer of anti-union views on plant premises constituted an unfair labor practice even though the views were non-coercive, and disapproved also of the Board's later view where the same result was reached by invoking the "captive audience" doctrine. Congress specifically indicated that Section 8 (e) was to change the law in that regard. The Board's holding here comports fully with the Congressional mandate.

The limitations of Section 8 (e) must be recognized, however. An employer's expression of his non-coercive views may not be made the basis of an unfair labor practice finding but Section 8 (e) does not exonerate the employer if there is an independent basis for such a finding. Thus, where an employer's denial of plant premises is independently discriminatory he obtains no immunity because he made a speech or distributed literature which itself falls within the Section 8 (e) immunity. On the other hand, where,

as in the instant case, the employer's expression or dissemination of his non-coercive anti-union views is the sole basis for an unfair labor practice finding, Section 8 (e) precludes such a finding.

The Board applied this principle in the *Livingston Shirt* case (107 NLRB 400) where the employer, a manufacturer, had a normal rule forbidding employee solicitation on plant premises during working time but permitting it during non-working time. The employer, however made a non-coercive, anti-union speech to the employees during working time and denied the union's request to reply under like circumstances. The Board, relying on Section 8 (e), held that the employer had not committed an unfair labor practice. The Board, however, distinguished the situation where the employer imposed "either an unlawful broad no-solicitation rule (prohibiting union access to company premises on other than working time) or a privileged no-solicitation rule (broad, but not unlawful because of the character of the business [*i. e.,* a department store rule])" (107 NLRB at 409). In such a situation the employer, having unlawfully or by claim of special privilege denied employees the use of their normal avenue of communication, *i. e.*, solicitation on plant premises during non-working time, acts discriminatorily when he takes advantage of that deprivation for his own benefit. Section 8 (e) does not preclude an unfair labor practice finding in such a situation, because that finding rests not on the employer's speech but on his deprivation of an avenue of communication normally available to them.

The same logic applies in the instant case. In *Livingston*, the employees retained their normal right to solicit on plant premises during non-working time and the employer's speech during working hours in no way deprived them of that right. Hence, there was no basis for an unfair labor practice finding other than the speech itself and that Section 8 (c) forbade. So here, the employer's distribution of literature in the plant in no way foreclosed the employees' normal avenues for the distribution of their literature off the plant, and the employer's distribution itself could not under Section 8 (c) be made the basis for an unfair labor practice finding.

C. Analysis of the relevant authorities in the several courts of appeals on this issue reveals that while there are some divergent views, the authorities for the most part support the analysis here made. The Second Circuit in *Bonwit Teller, Inc. v. National Labor Relations Board*, 197 F. 2d 640, and in *National Labor Relations Board v. American Tube Bending Co.*, 205 F. 2d 45, made clear that it would predicate an unfair labor practice finding on the employer's unilateral utilization of his premises for the expression of his non-coercive views concerning unionization *only* in the situation where his prohibition against employee use of that forum exceeded the normal limitations of such a prohibition. Thus, in the *American Tube* case, where the employer had a broad rule forbidding employee solicitation in the plant at all times, the Second Circuit noted that if the Board's unfair labor practice finding and order "had depended upon the [employer's] refusal, or failure, to allow [the union] to address the employees on

the property during working hours it could not stand" (205 F.2d at 46).

The rule adopted by the Board avoids this result, and at the same time avoids the converse view which assumes that merely because certain facilities for dissemination of views are available to the employer, the identical facilities must likewise be made available to his employees. As the Board noted in the *Livingston Shirt* case, *supra*, 107 NLRB at 407, "the equality of opportunity which the parties have a right to enjoy is that which comes from the lawful use [by] both the union and the employer of the customary fora and media available to each of them. It is not to be realistically achieved by attempting * * * to make the facilities of the one available to the other."

D. The principles developed in the foregoing authorities are applicable by analogy to the instant case. As already noted, distribution of literature by employees, unlike solicitation by employees, can be forbidden in the plant at any time, not only because literature which is distributed raises a hazard to the employer's interest in his production but because the purpose to be served by the distribution of literature in terms of employee interests can readily be served outside the plant. No special circumstances existed in the instant case precluding the application of this customary rule. The employees here were not prejudiced by the employer's distribution of literature on plant premises because they retained their correlative right to distribute literature through the customary

channels available to them. No unlawful discrimination arises from the fact that the employees were denied the use of plant premises for the distribution of their literature because the basic accommodation, approved by the courts, gave them no right or claim to such use in the first instance. Absent any other basis for the finding of an unfair labor practice, to posit such a finding on the mere fact that the employer has distributed non-coercive literature would be to ignore the provisions of Section 8 (e) which specifically immunize such conduct.

ARGUMENT

THE DECISION MADE BY THE BOARD IN THE INSTANT CASE IS A PROPER APPLICATION OF THE PRINCIPLES GOVERNING EMPLOYEE SOLICITATION AND DISTRIBUTION OF LITERATURE ON PLANT PROPERTY. THE CONTRARY RULING OF THE COURT BELOW SHOULD BE REVERSED

INTRODUCTORY STATEMENT

Oral solicitation and distribution of literature are traditional techniques in labor's struggle for organization and, generally speaking, fall within the ambit of activities protected by Section 7 of the Act. When employees seek to exercise these Section 7 rights on the premises of an employer, they intrude upon the right of the employer to control the use of his property and necessarily an adjustment must be made between these competing interests. The two organizational techniques do, however, differ in character and their implementation poses different problems both for the employer and the employees. The accommodation of these conflicting rights has given rise to ex-

tensive litigation as a result of which certain basic principles have been established. One of these principles, directly involved here, is that absent special circumstances or discriminatory motivation, an employer may make and enforce a broad rule prohibiting his employees from distributing union literature in his plant at any time.

Such a rule was in effect in the employer's plant in the instant case and the validity of the rule, as such, is not challenged. The question presented for review is whether such a rule becomes invalid and an unfair labor practice if the employer contemporaneously utilizes the plant premises for the distribution of his own non-coercive literature concerning unionization. This Court has not heretofore passed on the question. Hence, a reexamination of the nature of the conflicting employer-employee rights here involved is appropriate as well as a reexamination of the principles governing their accommodation. Moreover, the facts of the instant case raise for the first time before this Court an appraisal of the impact of Section 8 (e) upon this accommodation. That Section expressly provides, *inter alia*, that the dissemination of non-coercive views, argument, or opinion "shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act * * *." Since it is precisely such dissemination which is the basis for the alleged invalidity of NuTone's otherwise proper no-solicitation rule, Section 8 (e) is, as the court below acknowledged (R. 106), a critical factor in the interplay of rights which must here be accommodated.

We submit that, contrary to the reasoning of the court below, a reexamination of the basic principles in this field and a proper appraisal of the impact of Section 8 (c) vindicate the conclusion of the Board that NuTone's distribution of its own non-coercive literature on plant premises in no way impaired the validity of its rule forbidding its employees to utilize the premises for that purpose. We set forth hereunder the considerations which, in our view, justify that conclusion.

A. The principles governing the accommodation of the conflicting rights and the nature of the employer and employee rights involved

As this Court long ago made clear in *National Labor Relations Board v. LeTourneau Company of Georgia*, 324 U. S. 793, a case arising under the Wagner Act, the rules regarding solicitation and distribution of literature on plant premises evolved out of "an adjustment between the undisputed right of self-organization assured to employees under the Wagner Act and the equally undisputed right of employers to maintain discipline in their establishments." 324 U. S. at 797-798. Neither right is unlimited. "Opportunity to organize and proper discipline are both essential elements in a balanced society." *Ibid.*

Where there is no necessary conflict, neither right should be abridged. By the same token, where conflict does exist, the abridgement of either right should be kept to a minimum. This Court recently stated this principle and its underlying rationale in *National Labor Relations Board v. Babcock & Wilcox Company*, 351 U. S. 105, 112:

This is not a problem of always open or always closed doors for union organization on company property. Organization rights are granted to workers by the same authority, the National Government, that preserves property rights. *Accommodation between the two must be obtained with as little destruction of the one as is consistent with the maintenance of the other.* [Emphasis supplied.]

The rules heretofore established in this field have respected these controlling criteria. Thus, with regard to solicitation it is well settled that an employer may in the normal situation make and enforce a rule forbidding his employees to engage in union solicitation on plant property during working time, but that a broad rule banning such activity during non-working time is invalid. *Peyton Packing Company*, 49 NLRB 828, cited with approval in *LeTourneau, supra*, 324 U. S. at 803. On the other hand, with regard to distribution of literature, it is equally well settled that under normal conditions an employer rule forbidding employee distribution of literature in the plant proper may lawfully encompass even non-working time. See *Monolith Portland Cement Co.*, 94 NLRB 1358, 1366; *Tabin-Picker & Co.*, 50 NLRB 928; *LeTourneau Company of Georgia*, 54 NLRB 1253, 1258, *et seq.*; *LeTourneau, supra*, 324 U. S. 797.⁵

⁵ Where special circumstances exist, the usual rules do not apply. For example, employee solicitation can be forbidden even during non-working time where the nature of the employer's business requires such a broad limitation, e. g., the selling floors of a department store. *May Department Stores Co.*, 59 NLRB 976, enforced, 154 F. 2d 533 (C. A. 8), certiorari denied, 329 U. S. 725. Conversely, as *LeTourneau* itself estab-

No special justification is required for the imposition of such a broad *no-distribution* rule as is the case where a broad *no-solicitation* rule is sought to be imposed.*

The difference in the scope of the respective rules is revealing. For implicit in the rule respecting solicitation is the premise that absent some inroad on the employer's otherwise exclusive control over his property, the employees' right to self-organization through the medium of solicitation would be substantially frustrated. The "maintenance" of the employees' Section 7 right in that regard requires a partial "destruction" of the employer's property right. See *Babcock & Wilcox*, quoted *supra*, p. 19.

lishes, the considerations which underlie the validity of broad rules banning employee distribution of literature in actual working areas "do not have the same force in the case of parking lots." 54 NLRB at 1261. (But see *Babcock & Wilcox, supra*, 351 U. S. 105, where this Court upheld the validity of a parking lot prohibition against non-employee organizers.) Lumber camps and the like, where employees are isolated from normal contacts, likewise require a relaxation of otherwise permissible restrictions inasmuch as in such cases "union organization must proceed upon the employer's premises or be seriously handicapped." *LeTourneau, supra*; 324 U. S. at 799; *National Labor Relations Board v. Lake Superior Lumber Corp.*, 167 F. 2d 147, 150-151 (C. A. 6). Finally, where it is shown that the imposition or enforcement of restrictive rules in this field flow not from the employer's right to protect his legitimate property interests, but rather from his desire to obstruct the employees' statutory right of self-organization, the immunity otherwise accorded him in this regard is forfeited. *National Labor Relations Board v. Stowe Spinning Co.*, 336 U. S. 226, 230, 233; *Babcock & Wilcox, supra*; 351 U. S. at 111, n. 4.

* See preceding note.

On the other hand, the underlying premise of the no-distribution rule is that adequate protection of the employees' organizational rights in that regard can be assured without any corresponding "destruction" of the employer's property right.

The distinction is not fortuitous. It springs from the fact that solicitation and distribution of literature are different organizational techniques and their implementation poses different problems both for the employer and for the employees. Heretofore, the difference in result has been explained largely in terms of the employer's interests. Thus it has been noted that solicitation, being oral in nature, impinges upon the employer's interests only to the extent that it occurs on working time, whereas distribution of literature, because it carries the potential of littering the plant, raises a hazard to production whether it occurs on working time or non-working time. See authorities cited *supra*, p. 19.

The validity of this consideration cannot be gainsaid. But because it presents only one side of the employer-employee equation, it does not wholly resolve the problem. For example, if the employer interests alone were controlling, solicitation on plant premises could properly be denied altogether for no one would deny that the strong feelings frequently engendered by union solicitation inevitably carry over to some extent from non-working time to working time. And, on the other hand, the employer's unquestioned right to make reasonable regulations governing the manner and volume of literature distribution in the plant if such distribution were allowed would substantially

minimize any hazard to production raised thereby and, *pro tanto*, would abate the need for complete exclusion.

Logic and authority dictate, therefore, that we look also to the countervailing employee interests involved in the respective situations. The first requirement for an employee seeking to solicit his fellow employees is that he find a time and place appropriate for such solicitation. In *Republic Aviation Corporation*, 51 NLRB 1186, 1195, the Board pointed out that in the situation there presented, the free time of employees on plant property was "the very time and place uniquely appropriate * * * therefor" (quoted with apparent approval at 324 U. S. 801, n. 6). This is true, moreover, whether the plant involved is located, as in *Republic Aviation*, in a somewhat remote location or, as here, in the heart of a large city. In either case, the difficulty of drawing employees aside when they are hurrying to or from work, or when they are engaged in other activities away from the plant, is obvious. Accordingly, unless the right of employees to engage in effective solicitation is to be virtually nullified, at least a minimum intrusion upon employer property rights is required. The countervailing interest of the employer is afforded protection by restricting employee solicitation to non-working time.

This is not the case where distribution of literature is involved. The distinguishing characteristic of literature as contrasted with oral solicitation is that its message is of a permanent nature and that it is designed to be retained by the recipient for his perusal at his convenience. Hence, its purpose is satisfied so

long as adequate opportunity exists for its distribution. Access to the plant itself is not required for effective distribution. Indeed, in addition to the use of the mails or other forms of delivery, a pamphlet or circular can be handed to an employee as readily when he enters or leaves the plant as when he is in the plant. It is this consideration coupled with the employer's natural interest in keeping disorder in his plant to a minimum which differentiates distribution from solicitation. The Board and the courts quite reasonably concluded, therefore, that since adequate avenues exist for employee distribution of literature outside the plant, there was no occasion for the employer to surrender his normal property right with respect to the plant proper to provide still another.⁷

The foregoing considerations, we believe, expose the error in the view advanced by the Steelworkers and adopted by the court below (R. 106), that where an employer distributes his own literature in the plant he thereby forfeits his right to impose a no-distribution rule against the employees because he has by his own conduct vitiated the reason for the rule. This might well be true if littering were the sole reason for the rule, as Steelworkers and the court

⁷As already noted (p. 19, n. 5), these considerations "do not have the same force in the case of parking lots." Since production is normally unaffected by parking lot activity, the employer's property interest is correspondingly weaker when measured against the employee right of distribution. The accommodation reached in parking lot cases, therefore, is understandably at variance with the normal distribution rule. But even in parking lots, the employer may normally prohibit a *non-employee* from distributing union literature. *Babcock & Wilcox, supra.*

below assume.* But that is not the case. As we have shown, a reason of at least equal importance is that adequate avenues for distribution of literature by employees exist outside the plant. The employer's utilization of his premises for distribution of his own literature does not interfere with the employees' use of those avenues. Accordingly, since the employees' statutory right of self-organization is fully maintained, no "destruction" of the employer's normal property right is required. Cf. *Babcock & Wilcox, supra.*

The same considerations which militate against the view that the employer is required because of his own distribution of literature on plant premises to grant the use of those premises to the employees likewise refute the ancillary argument that he is required at the very least not to use the premises himself if he has denied that use to the employees. We submit that the purported distinction is without substance. The net of both positions is that the employer, here Nu-Tone, must forfeit its own right to use its premises for distribution of literature unless it grants the employees the same facilities. In either case, the employer is required to surrender, at least in part, his property right even though the employees' statutory right has not been impaired.

* Even if this proposition were correct it does not necessarily follow that because an employer may have elected to disregard his own best interests in the care of his property he must permit others to exercise the same liberty. As the Board noted in the instant case (R. 45), "Management prerogative certainly extends far enough so as to permit an employer to make rules that do not bind himself."

B. The impact of Section 8 (c)

As already stated, we believe that NuTone's utilization of its premises for the distribution of literature did not invalidate its rule, otherwise appropriate, forbidding its employees to utilize its premises for that purpose. This conclusion follows, in our view, from the nature of the employer-employee rights subject to accommodation and from the principles governing that accommodation. As already noted, however, Section 8 (c) of the Act is directly relevant here and the impact of that section upon the accommodation here reached must be appraised. That appraisal, we submit, confirms the correctness of the Board's conclusion.

It is undisputed that the literature distributed by NuTone, while anti-union, was free of threat of reprisal or force or promise of benefit. On its face, therefore, it fell within the coverage of Section 8 (c) of the Act which provides that—

- The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual, form shall not constitute or be evidence of an unfair labor practice under any of the provisions of the Act, if such expression contains no threat of reprisal or force or promise of benefit. [Emphasis supplied.]

The legislative history of that section* shows clearly that Congress contemplated its application, *inter alia*, to situations like that presented in the instant case.

* Summarized in large part in *National Labor Relations Board v. K. W. Woolworth Co.*, 214 F. 2d 78, 79, 80 (C. A. 6).

The Senate Committee which reported the bill embodying this provision, stated (S. Rep. No. 105 on S. 1126, 80th Cong., 1st Sess., pp. 23-24, reprinted in Leg. Hist. 429-430)¹⁰ that its purpose was to

insure both to employers and labor organizations full freedom to express their [non-coercive] views to employees on labor matters ***. The Supreme Court in *Thomas v. Collins* (323 U. S. 516) held contrary to some earlier decisions of the Labor Board, that the Constitution guarantees freedom of speech on either side in labor controversies and approved the doctrine of the *American Tube Bending* case (134 F. (2d) 993). The Board has placed a limited construction upon these decisions by holding such speeches by employers to be coercive if the employer was found guilty of some other unfair labor practice, even though severable or unrelated (*Monumental Life Insurance*, 69 N. L. R. B. 247), or if the speech was made in the plant on working time (*Clark Brothers*, 70 N. L. R. B. 802). The committee believes these decisions to be too restrictive and, in this section, provides that if, under all the circumstances, there is neither an expressed or implied threat of reprisal, force, or offer of benefit, the Board shall not predicate any finding of unfair labor practice upon the statement.¹¹

As the foregoing excerpt shows, Congress disapproved of the view taken by the Board in the Ameri-

¹⁰ The abbreviation "Leg. Hist." refers to Legislative History of the Labor Management Relations Act, 1947 (Gov't Print. Off., 1948).

¹¹ See also H. Rep. No. 245 on H. R. 3020, 80th Cong., 1st Sess., pp. 8, 33; Leg. Hist. 299, 324; H. Conf. Rep. No. 510 on H. R. 3020, 80th Cong., 1st Sess., p. 45, Leg. Hist. 549.

can Tube case (44 NLRB 121) that the mere airing by an employer of his anti-union views on company premises constituted an unfair labor practice even though the views were free of coercive content, and disapproved also of the Board's later view in the *Clark Brothers* case where the Board reached the same result by invoking the "captive audience" doctrine. Indeed, Congress specifically indicated that Section 8 (c) was to change the law in that regard. The Board's holding in the instant case comports fully, therefore, with the statutory text and its legislative history.¹²

This does not mean, nor may Congress be fairly taken to have intended, that Section 8 (c) be given an overriding significance without regard to other provisions of the Act. An employer's expression of his non-coercive views may not be made the basis for an unfair labor practice finding, but Section 8 (c) plainly does not exonerate the employer if there is an independent basis for an unfair labor practice in that regard. To cite an extreme example, an employer may

¹² The text and legislative history of Section 8 (c) likewise vindicate the Board's rejection of Steelworkers' claim urged before the Board and in the court below that NuTone's commission of other and independent unfair labor practices before and after the critical election here involved converted its otherwise lawful no-solicitation and non-distribution rules, impartially enforced as between rival employee groups during the election period, into an unfair labor practice. As already noted (*supra*, p. 2), the Board provided appropriate relief for these independent unfair labor practices in its remedial order and insured against their repetition. The court below did not rely or pass upon the Steelworkers' claim in this regard and any question arising therefrom, even if otherwise deemed appropriate for review, is not presented here.

not be exonerated from the sanctions of the Act for discharging an employee for union affiliation because in connection with that discharge he made a statement, protected by Section 8 (c), indicating his opposition to unionization. So here, Section 8 (c) would not exonerate the employer from an unfair labor practice finding notwithstanding the protected nature of his statement, if his denial of plant premises to the employees were independently discriminatory or accompanied by circumstances from which the Board could fairly draw an inference of discriminatory motive. Where, however, as in the instant case, the employer's expression or dissemination of his anti-union views is the sole basis for the unfair labor practice finding, Section 8 (c) precludes such a finding just as it would preclude a finding of unlawful discharge in the example cited if the employer's non-coercive anti-union statement were the sole basis for that finding.

The Board's holding in *Livingston Shirt Corp.*, 107 NLRB 400, relied upon by the Board in the instant case (R. 46), illustrates this point. In that case the employer had a manufacturing plant and under the customary rule applicable in such a situation, the employees had the right to engage in union solicitation during their non-working time. However, the employer was charged with an unfair labor practice because he made an anti-union but non-coercive speech to his employees on plant premises during working time and denied the union an opportunity to reply under like circumstances. As in the instant case the Board there found, one member dissenting, that no

unfair labor practice had been committed. Two Board members in the principal opinion in that case emphasized that in enacting Section 8 (c) Congress made it clear that employers should be free to influence their employees by expressing their non-coercive views and opinions (at 405-406). Furthermore, they noted that nothing in Section 8 (c) or in its legislative history suggests that Congress intended "to restrict an employer in the use of his own premises for the purpose of airing his views" or that his right to speak thereon, absent unusual circumstances, carries with it an obligation to provide an equal opportunity to reply (at 406).¹³

The Board, however, emphasized the limited scope of its holding. Thus, the Board explained that the situation was different where the employer imposed "either an unlawful broad no-solicitation rule (prohibiting union access to company premises on other than working time) or a privileged no-solicitation rule (broad, but not unlawful because of the character of the business [e. g., a department store rule]) * * *" (at 409). In such a case the employer, having unlawfully or by claim of privilege, based on special circum-

¹³ In his concurring opinion in *Livingston*, Board Member Peterson, the fourth member of the four-man Board which decided *Livingston* and a signatory to the decision in the instant case, agreed with the result reached. His agreement, however, was based not on Section 8 (c) which he felt was not an issue in the case, but merely on the ground that the employer's refusal to devote his time and property to the union for a reply speech did not under the facts of that case constitute a discriminatory denial of access to the union (107 NLRB at 409-410). The parallel facts in the instant case would, as the preceding section shows, dictate a parallel result.

stances, denied employees the use of their normal right of communication, *i. e.*, solicitation on plant premises during non-working time, acts discriminatorily when he takes advantage of that avenue for his own benefit. The finding of unfair labor practice in such a situation is not precluded by Section 8 (c) because it does not rest on the employer's speech but on the fact that he has deprived the employees of an avenue of communication normally available to them.

The application of the foregoing rationale to the instant case is clear. In *Livingston*, the employees retained their normal right to solicit on plant premises during their non-working hours. The speech of the employer during working hours in no way deprived them of that right. Hence, no basis existed for a finding of unfair labor practice other than the speech itself and that Section 8 (c) forbade. So in the instant case the employer's distribution of literature in the plant in no way deprived the employees of their normal avenues for distribution of literature and the employer's distribution itself could not under Section 8 (c) be utilized as the basis for an unfair labor practice finding.

Steelworkers urge, however, that there is no difference in ultimate result between the situation where the employer excludes pro-union group propaganda on plant premises and allows an anti-union group or some third party to air its views on those premises, and the situation where the employer excludes pro-union propaganda and himself airs anti-union views. Since the employer's action in the first situation is concededly an unfair labor practice, Steelworkers ar-

gues that his action in the second situation must likewise be an unfair labor practice.

The argument does not withstand analysis. Section 8(e), in terms, precludes the Board from basing an unfair labor practice finding upon an employer's expression or dissemination of his union views, absent threat of reprisal or force or promise of benefit. The fact that an employer's views may, because of his economic position, carry an impact far beyond its mere logic or persuasiveness is a consideration which is specifically foreclosed by Section 8 (e), if not by the First Amendment itself. See *National Labor Relations Board v. F. W. Woolworth Co.*, 214 F. 2d 78, 79-80 (C.A. 6). However, the fact that Section 8 (e) confers this immunity upon the employer does not give him a license to utilize his control over his property discriminatorily as between rival groups. Here the question of free speech is not involved, whether on the part of the employer or on the part of the employees. What the Act condemns in such a situation is the fact that the employer has given direct economic assistance to one rival union group and withheld it from another. Such conduct is expressly proscribed by Section 8 (a) (1) and (2) of the Act.

C. The relevant authorities

The impact of Section 8 (e) upon the accommodation of employer and employee rights in the matter of solicitation and distribution of literature on plant premises has given rise to divergent views in the courts of appeals. See, in addition to the instant case, *Bonwit Teller, Inc. v. National Labor Relations*

Board, 197 F. 2d 640 (C. A. 2), certiorari denied, 345 U. S. 905; *National Labor Relations Board v. American Tube Bending Co.*, 205 F. 2d 45 (C. A. 2); *National Labor Relations Board v. F. W. Woolworth Co.*, 214 F. 2d 78 (C. A. 6). Against the background of the principles already set forth, the validity of the several views can now be appraised.

Bonwit Teller, supra, was the first case to arise before the courts dealing with the kind of problem here presented. In that case the Board had given consideration to the problem whether an employer who, as did NuTone here, utilized plant premises during an organizational campaign for the purpose of communicating his views concerning unionization to the employees was obliged to accord a similar opportunity to the union. Bonwit Teller had in effect a rule forbidding union solicitation on the selling floors of its department store. Because it was a department store, Bonwit Teller availed itself of the special privilege of extending its no-solicitation rule to non-working as well as to working time. Nevertheless, despite the existence and enforcement of this broad rule, Bonwit Teller utilized its premises and working time to campaign against the union and denied the union an opportunity to reply under the same circumstances. The Board held, one member dissenting, that in denying the union request, Bonwit Teller violated Section 8 (a) (1) of the Act. 96 NLRB 608.

Noting that Bonwit Teller had availed itself of the special privilege granted department stores to ban union solicitation even on non working time, thereby imposing upon the employees "a practical disadvan-

tage . . . not sanctioned in other types of business operations," the Board held that the exercise of this "special privilege" gave rise to an obligation not to abuse that privilege by denying the union a like forum (at 612). The Board noted further that in its view the right of employees to select or reject representation by a labor organization "necessarily encompasses the right to hear both sides of the situation under circumstances which reasonably approximate equality" (*ibid.*). The Board recognized that this "equality of opportunity" doctrine would not require an employer "under any and all circumstances" to accord to a union the use of its plant premises as a union forum. What circumstances would invoke such a requirement would have to be determined "on a case-to-case" basis. The Board concluded, however, that under the special circumstances of the *Bonwit Teller* case where a broad no-solicitation rule had deprived the employees of their customary right to solicit on plant premises during their non-working time, equality of opportunity was denied by denial of the union request (*ibid.*). In answer to the dissenting member's contention that its conclusion did violence to the free speech guarantee of Section 8 (c), the Board pointed out that it did "not proscribe, nor find illegal what the Respondent said; or the manner in which it assembled its audience. We are concerned with *what the Respondent refused to do*" (Emphasis in original) (at 615). Accordingly, the Board directed Bonwit Teller to cease and desist from making anti-union speeches to the employees on plant premises during working time, unless it accorded the

union, upon reasonable request, a similar opportunity (at 615).¹⁴

Bonwit Teller sought review of the Board's decision and order in the Court of Appeals for the Second Circuit. That court, Judge Swan dissenting in part, agreed with the Board that Bonwit Teller had violated Section 8 (a) (1) of the Act by denying the union's request that it be granted the use of the employer's premises to reply to the employer's speech, 197 F. 2d 640. Like the Board, the Second Circuit predicated its holding on the narrow ground that Bonwit Teller had chosen to avail itself of the special privilege accorded department stores to ban employee solicitation even on non-working time, and, having done so, it was required to abstain from campaigning against the union on the same premises to which the employees were denied their normal access (at 645). However, the Second Circuit disagreed with the Board that the equality of opportunity doctrine required that Bonwit Teller accord the union the use of plant premises for a speech in reply to the employer's anti-union address. Pointing out that Bonwit

¹⁴ Notwithstanding that the Board's *Bonwit Teller* decision turned with respect to both its facts and rationale on the particular circumstances of a department store which enforced a broad no-solicitation rule, the Board subsequently applied the so-called "Bonwit Teller doctrine" to cases where these significant factors were not present. See, for example, *Metropolitan Auto Parts, Inc.*, 99 NLRB 401; *American Tube Bending Co.*, 102 NLRB 735. In *Livingston Shirt Co.*, already discussed, pp. 28-30, the Board, in reliance, *inter alia*, on the Second Circuit's decisions in the *Bonwit Teller* and *American Tube* decisions, recognized the limitations of the views it had expressed in *Bonwit Teller*.

Teller's violation lay in its discriminatory application of a broad no-solicitation rule, specially invoked because it was a department store, the court said (at 646) :

If Bonwit Teller were to abandon that rule, we do not think it would then be required to accord the Union a similar opportunity to address the employees each time [Bonwit Teller] made an anti-union speech. Nothing in the Act nor in reason compels such "an eye for an eye, tooth for a tooth" result so long as the avenues of communication are kept open to both sides.¹⁵

The Second Circuit later made its views even more explicit in the *American Tube Bending* case, *supra*, 205 F. 2d 45 (C. A. 2). There the employer, a manufacturer, promulgated and enforced a rule which not only enjoined employee solicitation on company property during working time, which was its right, but without any special justification therefor extended the prohibition to non-working time. Against this background, the employer made a non-coercive speech against the union on plant premises and denied the union a right to reply under the same circumstances.

¹⁵ Judge Swan, dissenting in part, felt that Section 8 (c) precluded a finding of unfair labor practice since in his view Congress intended by Section 8 (c) that the employer have the right to make a non-coercive anti-union speech on company time and property without any qualification predicated on the existence of a no-solicitation rule. As we show *infra*, p. 39, this was the view taken by Judge Allen in the principal opinion, in the *Woolworth* case. The majority in *Bonwit Teller* disagreed with Judge Swan, taking the position that "neither Section 8 (c) nor any issue of 'employer free speech' is involved in this case" (197 F. 2d at 645). See discussion *infra*, pp. 38-39.

The Board held that in the circumstances the employer's failure to afford the union such an opportunity constituted unlawful discrimination and ordered the employer to refrain from discriminatorily applying its no-solicitation rule. Judge Learned Hand, writing the principal opinion for the court, said (205 F. 2d at 46):

Our decision in *Bonwit Teller, Inc. v. N. L. R. B.*, 2 Cir., 197 F. 2d 640, rules the case at bar. There we said that it was an unfair labor practice for the employer to exercise his privilege under § 8 (e) of addressing his employees on the premises and arguing against the formation of a union if he imposes a "no-solicitation" rule against union agitation on the premises. However, we held that, since the employer operated a number of retail stores in New York and elsewhere, it was lawful (as indeed the Board conceded) for such an employer to forbid solicitation at any time upon the premises. That was an exception to the general duty to allow solicitation on the premises in non-working hours, that the Supreme Court in *Republic Aviation Corp. v. N. L. R. B.*, 324 U. S. 793, 65 S. Ct. 982, 89 L. Ed. 1372, recognized that the Board might impose in factories and the like. We rested our decision wholly upon the exception and reversed that part of the Board's order that had held it an unfair labor practice for an employer to address his employees on the premises during working hours, where he had refused to allow the representative of the union an equal privilege.

If therefore the Board's order in the case at bar had depended upon the respondent's re-

fusal, or failure, to allow [the union] to address the employees during working hours it could not stand. On the other hand, since the respondent refused to allow any solicitation on the premises during nonworking hours, that was in itself an unfair labor practice, for it did not operate a retail store; and it was an added unfair practice for it to address the employees, while such a rule was in force. [Emphasis supplied.]

We submit that the doctrine enunciated in the foregoing cases pays due deference to the accommodation of conflicting employer and employee rights defined in the *LeTourneau* and *Babcock & Wilcox* cases, and to the immunity youchsafed by Section 8 (c). As already pointed out, the underlying basis of the normal no-solicitation rule which limits the restriction of employee activity in that regard to working time only is that employees must have the right to solicit on non-working time if their statutory right to organize in that regard is to be effectuated. No more than that is required, however, to balance the countervailing right of the employer. All the normal means of communication remain available to the respective parties. As the Board said in the *Livingston Shirt* case, *supra*, 107 NLRB at 406-407:

* * * an employer's premises are the natural forum for him just as the union hall is the inviolable forum for the union to assemble and address employees * * * there remains open [to the union] all the customary means for communicating with employees * * *. We believe that the equality of opportunity which the

parties have a right to enjoy is that which comes from the lawful use [by] both the union and the employer of the customary fora and media available to each of them. It is not to be realistically achieved by attempting * * * to make the facilities of the one available to the other.¹⁶

Accordingly, where a valid accommodation has been reached—in the case of solicitation, a rule enjoining employee solicitation during working time but permitting solicitation during non-working time—the employer is merely exercising his countervailing right when he utilizes plant premises to make an anti-union speech. So long as that speech is non-coercive, Section 8 (c) precludes a finding of unfair labor practice. An order based on such an unfair labor practice finding "could not stand." *American Tube, supra*, 205 F. 2d at 46. Where, however, an employer without justification therefor imposes a broad no-solicitation rule banning solicitation even on non-working time or where, as in the case of a store, an employer avails himself of the special privilege of imposing such a broad ban, it is an unfair labor practice for the employer to address his employees during working hours and to deny the union an equal privilege.) In such a situation, the equality of opportunity which is the premise of the accommodation no longer exists and the effect of the employer's action is to work a discriminatory preference

¹⁶ The Board here noted that the contrary view stemmed from the "captive audience" concept underlying *Clark Brothers Co., Inc.*, 70 NLRB 802, a decision which was expressly repudiated by Congress and was a motivating factor leading to the enactment of Section 8 (c). See pp. 26-27, *supra*.

at the expense of the employees. Section 8 (c) affords the employer no immunity here, for the vice lies not in the employer's speech but in the fact that he has deprived the employees of their normal right to use plant premises for solicitation during working hours and has then taken advantage of that deprivation for his own anti-union purposes.

The failure to recognize the proper limitations of the Section 8 (c) immunity gave rise to difficulties in the Sixth Circuit's disposition of the *Woolworth* case, *supra*, 214 F. 2d 78. In that case, as in *Bonwit Teller*, the employer, a department store, had in effect a broad rule banning employee solicitation on plant premises at all times. As in *Bonwit Teller* also, the employer assembled the employees on plant premises during working time to listen to his views concerning unionization and denied the union a right to reply under the same circumstances. The Board found that this action constituted a violation of the Act. The Sixth Circuit reversed the Board in a split opinion. Judge Allen writing the principal opinion adopted the view of dissenting Judge Swan in the *Bonwit Teller* case (*supra*, n. 15) that "Section 8 (c) has direct and controlling application and that a no-solicitation rule cannot cut down the rights given the employer under Section 8 (c)" (214 F. 2d at 81). Judge Miller concurred but relied on the fact that the portion of *Woolworth*'s no-solicitation "rule pertaining to non-working time was *** not enforced. That portion of the rule which was enforced was a valid regulation" (at 84). Accordingly, applying the rule of law laid down in the Second Circuit's *Bonwit*

Teller and *American Tube* decisions and in the Board's *Livingston Shirt* decision, Judge Miller concluded that no violation had occurred. Judge McAllister, dissenting, took the view of the facts taken by the Board and by Judge Allen, namely, that the no-solicitation rule was applied to non-working as well as working time. On this view of the facts, Judge McAllister, applying the same authorities applied by Judge Miller, concluded that the employer had committed an unfair labor practice.

In sum, then, two of the judges in *Woolworth*, though seeing the facts differently, adopted the view of Section 8 (c) set forth by the Second Circuit in *Bonwit Teller* and *American Tube* and by the Board in *Livingston Shirt*. The contrary view, adopted only by Judge Allen,¹⁷ which gives Section 8 (c) a controlling significance overlooks in our judgment the nature of the accommodation which underlies no-solicitation and no-distribution rules in the first instance.

D. The application of the foregoing principles to the instant case

The principles developed in the foregoing authorities are applicable by analogy to the instant case. For while the basic considerations entering into the accommodation of employer and employee rights respecting solicitation differ somewhat from those respecting distribution of literature because of the

¹⁷ In characterizing the latter view as "the one taken by the Court of Appeals for the Sixth Circuit" (R. 108), the court below overlooked the limitations of Judge Miller's concurring opinion.

nature of the respective media (See Section A, *supra*), the underlying principle governing their accommodation is the same, namely, that the accommodation between the two conflicting rights "be obtained * * * with as little destruction of the one as is consistent with the maintenance of the other." *Babcock & Wilcox, supra*, 351 U. S. 105, 112.

As already noted, distribution of literature by employees, unlike solicitation by employees, can be forbidden in the plant at any time, not only because such distribution impinges upon the employer's legitimate interests in maintaining plant discipline and efficiency, but because the purpose served by the distribution of literature in terms of employee interests can readily be served outside the plant. The validity of a broad no-distribution rule absent special circumstances is therefore well settled.

No special circumstances existed in the instant case. The facts summarized *supra*, pp. 3-4, reveal that NuTone is a typical manufacturing plant located on a public street in a metropolitan city. No problem of access was involved. Union literature could be, and was, readily distributed to NuTone's employees. The usual avenues available to the union or to the employees for such distribution, *e. g.*, distribution at plant gates, distribution by mail, distribution to the employees at their homes or at the union hall, were in no way foreclosed.¹⁰ In view of these circumstances

¹⁰ The adequacy of these modes of distribution is at least suggested by the fact that neither Steelworkers nor the employees ever asked NuTone for permission to distribute literature on plant premises.

Steelworkers concedes the propriety of NuTone's broad distribution rule as such.

Accordingly, the situation here is no different in essence from the situation in *Livingston Shirt* where a valid no-solicitation rule was in effect or the situation hypothesized in *Bonwit Teller* and *American Tube* if the invalid extensions of the no-solicitation rules there had been abandoned. In the latter situations the employees are not prejudiced by the employer's speech on plant premises because they retain their correlative right to solicit on plant premises during non-working time. In the instant case the employees are not prejudiced by the employer's distribution of literature on plant premises because they retain their correlative right to distribute literature through the customary channels normally available to them. No unlawful discrimination arises from the fact that the employees were denied the use of plant premises for the distribution of their literature because the basic accommodation, approved by the courts, gave them no right or claim to such use in the first instance.¹⁹

¹⁹ The error of the court below, we believe, arises from its failure to perceive this distinction. So far as appears, the court below failed to attach any significance to the critical fact that adequate avenues for employee distribution of literature existed off plant premises whereby the employees could effectively exercise their statutory rights in that regard. Viewing the case as one where only plant premises were available for effective distribution of literature by employees, a prohibition on such use where the employer himself utilized those premises would obviously be an unlawful discrimination. See discussion *supra*, p. 19, note 5.

It follows, we believe, that just as in the typical solicitation case where a properly limited rule is in effect, an employer does not commit an unfair labor practice by utilizing his own premises for a non-coercive speech, so in the instant case he does not commit an unfair labor practice by utilizing his own premises for the distribution of non-coercive literature. In both cases the employer is merely using an avenue of communication normally and naturally available to him, and to the extent that the avenue of communication is proscribed to the employees, that proscription is the product of a valid adjustment already made by the applicable no-solicitation or no-distribution rule, as the case may be. No illegal or unduly broad proscription having been imposed by the employer, he incurs no special obligation either to forfeit his normal rights or to compensate the employees in some manner because he exercises them. And absent any other ground for the finding of an unfair labor practice, to posit such a finding on the mere fact that the employer has distributed non-coercive literature would be to flout the Section 8 (e) provisions which specifically immunize such conduct.

CONCLUSION

For the reasons stated, it is respectfully submitted that the judgment of the court below should be reversed to the extent that it requires modification of the Board order by incorporating a provision relating to Nu-

Tone's enforcement of the no-solicitation and no-distribution rules.

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I have authorized the filing of this brief.

J. LEE RANKIN,
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SEPTEMBER 1957

APPENDIX

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C., 151, *et seq.*), are as follows:

RIGHTS OF EMPLOYEES

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purposes of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a) (3).

UNFAIR LABOR PRACTICES

SEC. 8. (a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

(2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it:

(c) The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

NATIONAL LABOR RELATIONS BOARD, Petitioner

v.

UNITED STEELWORKERS OF AMERICA, CIO,
AND NUTONE, INCORPORATED

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE DISTRICT OF
COLUMBIA CIRCUIT

MEMORANDUM FOR RESPONDENT
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IN THE
Supreme Court of the United States

OCTOBER TERM, 1956

No. 785

NATIONAL LABOR RELATIONS BOARD, Petitioner

v.

UNITED STEELWORKERS OF AMERICA, CIO,
AND NUTONE, INCORPORATED

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR RESPONDENT
UNITED STEELWORKERS OF AMERICA

The Board's petition here has artfully rephrased the question and restated the facts so as to obscure the real issue involved. Although, for reasons to be stated below, we agree that certiorari should be granted, we think that the Court is entitled to know, with somewhat more precision, what this case is about.

QUESTION PRESENTED

The question here presented, as stipulated below (R. 9-10) by all of the parties—the Board, the Union, and the Company—is this:

"Whether an employer commits an unfair labor practice if, during a pre-election period, it enforces an other-

wise valid rule against employee distribution of union literature in the plant, while, during that same period, itself distributing non-coercive anti-union literature within the plant in a context of other unfair labor practices, committed prior to the election period and thereafter." (R. 8)

THE FACTS

In the spring of 1953 the Steelworkers Union tried to organize the employees of NuTone, Inc. The Company was not neutral. It actively opposed the Union. In addition to discharging three employees because they were active on behalf of the Union, it "actively campaigned for the Union's defeat" by ordering foremen to distribute "anti-union propaganda" throughout the plant.

At the same time as it engaged in this campaign to defeat the Union, it posted a notice warning the employees that they must not "pass out handbills or other literature on company property." (R. 26) Indeed, as the Trial Examiner here noted, "one piece of the Company's campaign material was distributed on the very date on which the Company posted its . . . rule . . . which prohibited employees from passing out literature on Company property." (R. 27)

The Union lost the election. Immediately thereafter, in accordance with a suggestion "which the Company had planted in its election propaganda" (R. 37), an "inside" union was organized. The Company gave this organization its open assistance and support. Part of this support was mimeographing material for the "inside" union and having it distributed by foremen and others throughout the plant.

¹ The words are those of the Trial Examiner. (R. 27) The Board, in a masterpiece of understatement, now refers to this literature as "anti-union in tone." (Pet. p. 4) Typical of this "tone" was the following exhortation in one leaflet: "Don't let the Union take away your future opportunities at NuTone. Don't get mixed up in strikes." (R. 27)

in the same way that the Company's anti-Steelworker campaign material had been distributed.² (R. 40-41)

The Union filed unfair labor practice charges (and also sought to set aside the election). In the unfair labor practice proceedings, the Company was found to have violated the Act by the three discharges and the assistance to the "inside union" (R. 50, 57, 60), and these findings are not contested here. With respect to the claim that the employer had discriminatorily enforced the no-distribution rule, the Trial Examiner concluded that when "the Company itself entered the anti-union lists and actively campaigned for the Union's defeat on a field to which it had denied admittance to the Union" it committed an unfair labor practice. (R. 27, 54) The Board reversed, Member Murdock dissenting. The Board's view, concisely stated,

² In explanation of these apparent violations by the Company of its no-distribution rules, the Company in the court below blandly asserted that there was no such violation because the rules was never intended to prevent the Company from campaigning in this way against the Union; it was only intended to apply to employees.

"NuTone never intended to restrict its own posting and distribution activities when it announced them. NuTone was not talking out of both sides of its mouth at once—both to itself and to its employees; it meant that only voting employees would hear and heed the rules and it spoke directly to them, alone.

"One more important consideration is the intended *duration* of these rules. This intentment is to be ascertained by fitting them into their factual context—a situation beginning with the raising of the representation question which brought on the intense campaigning and in consequence, the rules, but which ended with finality on the election date. The rules were clearly intended to deal with a short period and a transitory situation . . . They did become ineffective automatically on August 19.

"Therefore, in plain and controlling distinction from similar decisions finding violations of Section 8(a)(1), NuTone did not discriminatorily enforce its no-distribution rule by enforcing it against employees while relaxing it with respect to itself, for the rule never applied to it."

(Brief for NuTone, Inc. in Nos. 12,754 and 12,812, Court of Appeals for the District of Columbia Circuit, pp. 43-44.)

was that "management prerogative certainly extends far enough so as to permit an employer to make rules that do not bind himself." (R. 59) And so, in the name of free speech, the Board sanctioned the employer's action in prohibiting the employees from disseminating their views on the union question through the distribution of literature on company property while, at the same time, he ordered foremen to use that same method of communication in campaigning against the union.

The Court of Appeals, in turn, reversed the Board and directed it to issue the order which the Trial Examiner had recommended. The Board, the Solicitor General *dubitante*,³ has petitioned for certiorari.

ARGUMENT

1. The decision below is plainly correct. The question is not, as the Board puts it, "whether . . . enforcement against employees of no-distribution . . . rules, valid under the *Republic* and *LeTourneau* test, becomes an unfair labor practice if the employer is himself disseminating his own non-coercive views concerning unionization," (Pet.³ p. 9.) Everyone concedes that an employer can enforce valid no-distribution rules and at the same time disseminate his own views concerning unionization. The question is whether he unlawfully interferes with the employees' right under Section 8(a)(1) of the Act to engage in self-organizational activities if he forbids them to use, on their own time, precisely the same method of dissemination which he directs his foremen to use in campaigning against the union. That question, we believe, answers itself.

The applicable principles are well established by decisions of this Court. First, "no restriction may be placed on the employee's right to discuss self-organization among themselves, unless the employer can demonstrate that a restric-

³ Pet. p. 11, fn. 6.

tion is necessary to maintain production or discipline. *Republic Aviation Corp. v. Labor Board*, 324 U.S. 793, 803.¹⁴ Second, if such restriction is permissible to maintain production or discipline, it is only valid, even as to non-employees, "if the employer's notice or order does not discriminate against the union by allowing other distribution." *Labor Board v. Babcock & Wilcox Co.*, 351 U.S. 105 at 112.

The decision of the Court of Appeals in this case is the only possible one under these principles. It is in accord with every other decision by this Court, the courts of appeals, and the Board itself, prior to the change of position signalled by the Board's 1953 decision in *Livingston Shirt Corp.*, 107 NLRB 400. See, e.g., *NLRB v. American Furnace Co.*, 158 F. 2d 376 (7th Cir., 1946); *Macon Textiles, Inc.*, 80 NLRB 1525 (1948); *Goodall Co.*, 86 NLRB 814 (1949); *American Thread Co.*, 101 NLRB 1306 (1952); *Johnston Lawnmower Corp.*, 107 NLRB 1086 (1954). See also *Labor Board v. Waterman S. S. Co.*, 309 U.S. 206.

2. The Board asserts that the decision below conflicts with the Sixth Circuit decision in *NLRB v. Woolworth Co.*, 214 F. 2d 78, and the dissenting opinion of Judge Swan in *Bonwit Teller, Inc. v. NLRB*, 197 F. 2d 640, 646 (C.A. 2).

The *Woolworth* and *Bonwit Teller* cases deal with a somewhat different situation than that presented here. In both of those cases the employer operated a retail store. In both cases the employer closed the store and assembled the employees, on working time and on company property, to listen to an anti-union address. And, in both cases, a union organizer requested the company to perform a similar service

¹⁴ The rule is quoted as described by this Court in *Labor Board v. Babcock & Wilcox Co.*, 351 U.S. 105, 113. This principle obviously applies to the distribution of literature as well as oral solicitation, the only difference being that the facts necessary to demonstrate that restriction is necessary to maintain production or discipline may be different in the two cases.

for the union, providing it with a "captive audience" similar to the one which the employer addressed. The question in both cases was whether a Board decision that the employer's refusal to provide this audience for the union organizer was an unfair labor practice should be enforced. Both circuits agreed that it should not be.

There the agreement ended, however. The Second Circuit, in *Bonwit Teller*, said nothing required the "eye for an eye, tooth for a tooth" result demanded by the Board. 197 F. 2d at 646. But it went on to note that the employer, simultaneously with its use of the "captive audience" device, enforced a rule which prohibited any union solicitation on the selling floor, even on non-working time. It was ordinarily entitled to enforce such a rule because of the special conditions affecting retail stores. *May Department Stores Co.*, 59 NLRB 976; *enforced* 154 F. 2d 533 (8th Cir. 1946) *cert. denied* 329 U.S. 725.⁵ But, said the Second Circuit, the employer's use of the premises, involved in the captive audience speech, constituted discriminatory application of the no-solicitation rule and hence was an unfair labor practice. In this view, "neither § 8(c) nor any issue of free speech" was involved. Judge Swan dissented on this second point.

In the *Woolworth* case in the Sixth Circuit, two of the judges were in agreement with the Second Circuit that the employer need not provide a captive audience for the union if it provided one for itself, but they divided on the question of discriminatory enforcement of the special, broad, no-solicitation rule. Judge Allen, for herself alone, said that a no-solicitation rule, no matter what its scope, could not cut down the absolute right of free speech granted by § 8(c).

⁵ Significantly, the Board in that case simultaneously established its definitive rule that all solicitation on the selling floor of a retail establishment could ordinarily be banned and found that in the particular case the ban violated the Act because it was discriminatorily enforced.

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of the Act. 214 F. 2d at 83. If the employer's broad no-solicitation rule was privileged, for the reasons found by the Board, the fact that the employer made a speech to the employees on company time and property could not make it invalid. In so concluding she expressly disagreed with the majority of the Second Circuit in the *Bonwit Teller* case and agreed with Judge Swan's dissent. *Id.* at 81. Judge Miller concurred in the result, but on the special ground that the rule against employee solicitation on non-working time was not involved and had not been enforced. Judge McAlister dissented.

The *Bonwit Teller* and *Woolworth* cases, as must now be apparent, are quite different from the present case. The principles applicable to no-solicitation rules are also applicable, by analogy, to no-distribution rules. But in *Bonwit Teller* and *Woolworth*, the employer did not forbid solicitation by employees during store hours and simultaneously instruct his foremen to solicit against the union under the same circumstances—which would be the precise parallel to the present case. Instead he closed the store, assembled the employees and made an anti-union speech. Furthermore, in both cases the unfair labor practice found by the old Board was the refusal of a request by a union organizer (not an employee) that the employer take the affirmative action of assembling the employees on company premises to hear a pro-union speech. Cf. *Labor Board v. Babcock & Wilcox Co., supra*.

In this case, on the contrary, the union's grievance was not that the employer should distribute leaflets for it—although the employer did both mimeograph and distribute leaflets for the company union which was organized after the election. The grievance of the union here is simply that the employer refused to permit the employees to distribute their own leaflets in the plant during non-working time while supervisors were being directed to distribute anti-union leaflets on the same premises.

We do concede, however, that the broad reasoning which Judge Allen used in the *Woolworth* case is inconsistent with the reasoning of the court below (as well as with the principles established by this Court and uniformly adhered to by the Board prior to 1953). It is even more inconsistent, and expressly so stated, with the majority decision of the Second Circuit in the *Bonwit Teller* case. *Bonwit Teller* says that there is no issue as to free speech where a no-solicitation rule is found to be discriminatorily enforced because the employer violates it. Judge Allen in the *Woolworth* case says to the contrary, that the presence of a no-solicitation rule cannot limit employer free speech.

The Board apparently did not consider the fact that Judge Allen's opinion is in flat conflict with that of the Second Circuit, as well as the decisions of every other court that has dealt with the subject, to be sufficient to call for a petition for certiorari in the *Woolworth* case. Instead, it adopted Judge Allen's view. Now that the Court of Appeals for the District of Columbia, in a different factual situation, has adhered to the simple principle established by this Court that rules against solicitation and distribution must be applied without discrimination, the conflict is represented as being of such nature that certiorari should be granted even though the Solicitor General avows his doubts as to the correctness of the Board's position!

3. Were the considerations above the only relevant ones we would not urge that the Board's petition be granted. We would confidently expect that, if certiorari were denied, the Board would not continue to rely on Judge Allen's opinion, in contradiction to the views of this Court, the Second Circuit and the court below.

But in an extra-ordinary footnote, appended to the Board's petition for certiorari, the Solicitor General informs the Court that the Board "intends to adhere to its present position unless and until the contrary views expressed in

the decision below should be definitively accepted." * Since this is asserted as a reason for granting certiorari, we assume that a denial of certiorari would not constitute such a definitive acceptance of the views of the court below as to cause the Board to adhere to them.

This assertion, we believe, supplies a sufficient and, indeed, a compelling reason for this Court to grant certiorari.

To understand the importance of the Board's position, it is necessary to remember that no conflict of decision is likely to arise if the Board adheres to the course which it has thus announced. Indeed, it is unlikely that any other case will be presented for judicial decision in which the question here involved can again be reviewed. The General Counsel of the Board will not, in the normal course of events, issue a complaint if the Board has made it clear in its decisions that the conduct complained of does not constitute an unfair labor practice.⁷ The present case arose only because the General Counsel of the Board assumed, as he had every right to assume on the basis of prior Board decisions, that the employer's actions here constituted an unfair labor practice. If the Board adheres, as it has said it will, to its present position, the General Counsel will presumably not issue complaints in cases like the present one. Since the refusal of the General Counsel to issue a complaint is not reviewable in any court,⁸ no unfair labor practice case is likely to arise in which the definitive acceptance required by the Board can be achieved.

Even more importantly, the Board's decision to adhere to its present views despite the decision of the court below will have a very great impact on its conduct of representation proceedings, without any possibility of review in this

* Pet. p. 11.

⁷ See the remarks of General Counsel Kammholz quoted in 36 LRRM 211.

⁸ *Lincourt v. NLRB*, 170 F. 2d 306 (1st Cir. 1948); *General Drivers v. NLRB*, 179 F. 2d 492 (10th Cir. 1950).

or any other court. Normally, where an employer has discriminatorily applied its no-solicitation or no-distribution rules in an election campaign, the union will protest the conduct of the election as well as file an unfair labor practice charge.⁹ In this case, indeed, just such objections were filed. Under the Board's established rules those objections will be sustained only if the General Counsel issues an unfair labor practice complaint. They will be overruled if the employer's actions do not constitute an unfair labor practice. *Times Square Stores Corp.*, 79 NLRB 361 (1948); *Parker Bros. & Co.*, 110 NLRB 1909 (1954). Cf. *Crown Drug Co.*, 110 NLRB 845 (1954), and *Peerless Plywood Co.*, 107 NLRB 427 (1953) (24 hour rule on speeches). In accordance with this rule, the Regional Director here dismissed the union's objections to the conduct of the election, after the Board's decision in the unfair labor practice case and in reliance on it.¹⁰

The result is that in any election proceeding in which there is the kind of discriminatory application of no-distribution or no-solicitation rules which is involved here, a union will not be able to challenge the conduct of the election and obtain a new election unprejudiced by such conduct. And there is no possible way in which a union can challenge the Board's rulings to that effect. See *General Drivers v. NLRB*, 179 F. 2d 492 (10th Cir. 1950). If this Court should affirm the decision below, on the other hand, the contrary result will follow.

For these reasons, the effect of the Board's assertion that, unless this Court grants certiorari, it will continue to administer the Act in accordance with the views of Judge Allen will be to establish a rule affecting both unfair labor practice cases and representation proceedings which is contrary to the principles established by this Court and every

⁹ See, e.g., *Bonwit Teller, Inc. v. NLRB*, 197 F. 2d 640 at 642, fn. 1.

¹⁰ *NuTone, Inc.*, Case No. 9-RC-2020 (unreported).

other court that has passed on the question but will become virtually unreviewable in any court. The "definitive acceptance" which the Board apparently requires in order to accomplish a change in its administration of the Act can only come as a result of a grant of certiorari in this case.

Under these circumstances we concur with the Solicitor General that it is appropriate that the Court grant certiorari to resolve the conflict between Judge Allen's opinion and that of the court below. We suggest, however, that the Solicitor General does not go far enough. The difficulty presented by the Board's position can be remedied by summarily affirming the decision of the court below. Cf. *U.S. v. Lane Motor Co.*, 344 U.S. 630.

Respectfully submitted,

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No. 81

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1957

NATIONAL LABOR RELATIONS BOARD, Petitioner

v.

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AND NUTONE, INCORPORATED

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE DISTRICT OF
COLUMBIA CIRCUIT

BRIEF FOR RESPONDENT
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IN THE
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OCTOBER TERM, 1957

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v.

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BRIEF FOR RESPONDENT
UNITED STEELWORKERS OF AMERICA

QUESTION PRESENTED

The question here presented, as stipulated below (R. 9) by all of the parties—the Board, the Union, and the Company—is this:

“Whether an employer commits an unfair labor practice if, during a pre-election period, it enforces an otherwise valid rule against employee distribution of union literature in the plant, while, during that same period, itself distributing non-coercive anti-union literature within the plant in a context of other unfair labor practices, committed prior to the election period and thereafter.” (R. 7.)

STATEMENT

In April 1953 the Steelworkers Union began efforts to organize the employees of NuTone, Inc. (R. 12.) The company was not neutral. It actively opposed the Union. In May and June, its supervisory personnel unlawfully interrogated workers as to their knowledge of Union activities, solicited reports on Union activities, and promised benefits to employees who remained loyal. (R. 14-16.) Sometime in June, it discharged three employees because they were active on behalf of the Union.¹ Finally, beginning on June 12, it "actively campaigned for the Union's defeat" by ordering foreman to distribute "anti-union propaganda"² throughout the plant.

The Company's literature, while not coercive, was certainly not dispassionate. The "message" distributed by the foremen within the plant on June 12 denounced Union statements as "just a pack of lies" (R. 83) and said that all the union wanted was "to take the \$36.00 a year from you and perhaps lose you a lot of working days. . . ." (R. 85.) A leaflet distributed in the plant on August 12 told the employees "You Lose With CIO" and that a vote against the union was a vote against strikes, against hatred among employees and against "outsiders pushing you and telling you what to do." (R. 64, 87.) On August 18, the day before the election, the leaflet distributed by the Company within the plant boasted that, in a prior election, "We beat the Union—6 to 1." (R. 62, 81.)

At the same time as the Company engaged in what the

¹ The exact date is uncertain because the three employees^s were among a number who had been laid off for economic reasons on June 9 and, as found by the Board, the Company decided, sometime during the period of layoff, with "calculation and intent to restrain and discourage Union membership" not to recall them. This decision to discharge, although made earlier, became effective on June 23, when the other employees who were also laid off, but who had less seniority, were recalled to work. (R. 25.)

² The words are those of the Trial Examiner. (R. 18-19.)

Trial Examiner subsequently called "campaigning against the Union in the normal arena, and the most effective one for reaching the employees" (R. 20), it simultaneously denied access to that arena by the Union. Between August 5 and August 12, the Company issued and posted throughout the plant notices warning employees that the Company had a rule against posting signs on company property, against soliciting or campaigning on company time, and against the distribution of handbills or other literature on company property (R. 76, 17-19). These rules, the company said, applied to both sides of the union question. The company did not, however, regard the rules as applicable to its own action in ordering its supervisors, on working time, to engage in precisely the conduct forbidden by the rules in distributing anti-union campaign material to all of the employees within the plant. Indeed, as the Trial Examiner here noted, "one piece of the Company's campaign material was distributed on the very date on which the Company posted its . . . rule . . . which prohibited employees from passing out literature on Company property." (R. 19.)

The Union lost the election. Immediately thereafter, in accordance with a suggestion "which the Company had planted in its election propaganda" (R. 28), an "Employee Committee" was organized. The Company gave this organization its open assistance and support. Part of this support was mimeographing material for it and having it distributed by foremen and others throughout the plant, in the same way that the Company's anti-Steelworker campaign material had been distributed.³ (R. 31.)

³ In explanation of these apparent violations by the Company of its no-distribution rules, the Company in the court below blandly asserted that there was no such violation because the rules were never intended to prevent the Company from campaigning in this way against the Union; it was only intended to apply to employees:

"NuTone never intended to restrict its own posting and distribution activities when it announced them. NuTone was not talking out of both sides of its mouth at once—both to itself and to its em-

The Union filed unfair labor practice charges (and also sought to set aside the election). In the unfair labor practice proceedings, the Company was found to have violated the Act by its interrogation and promises to individual employees, by the three discharges and by the assistance to the company union. (R. 39, 40, 44.) These findings are not contested here. With respect to the claim that the employer had discriminatorily enforced the no-distribution rule, the Trial Examiner concluded that when "the Company itself entered the anti-union lists and actively campaigned for the Union's defeat on a field to which it had denied admittance to the Union" it committed an unfair labor practice. (R. 18, 20.) The Board reversed, Member Murdock dissenting. The Board's view, concisely stated by it, was that "valid rules against solicitation and other forms of union activity do not control an employer's actions. Management prerogative certainly extends far enough so as to permit an employer to make rules that do not bind himself." (R. 45-46.)

The Court of Appeals, in turn, reversed the Board and directed it to issue the order which the Trial Examiner had

ployees; it meant that only voting employees would hear and heed the rules and it spoke directly to them, alone.

"One more important consideration is the intended *duration* of these rules. This intendment is to be ascertained by fitting them into their factual context—a situation beginning with the raising of the representation question which brought on the intense campaigning and in consequence, the rules, but which ended with finality on the election date. The rules were clearly intended to deal with a short period and a transitory situation . . . They did become ineffective automatically on August 19.

"Therefore, in plain and controlling distinction from similar decisions finding violations of Section 8 (a) (1), NuTone did not discriminatorily enforce its no-distribution rule by enforcing it against employees while relaxing it with respect to itself, for the rule never applied to it."

(Brief for NuTone, Inc. in Nos. 12,754 and 12,812, Court of Appeals for the District of Columbia Circuit, pp. 43-44.)

recommended. The Board, the Solicitor General *dubitante*,⁴ petitioned for certiorari, alleging a conflict between the decision below and the decision of the Sixth Circuit in *NLRB v. F. W. Woolworth Co.*, 214 F. 2d 78.

SUMMARY OF ARGUMENT

I.

This case presents the question of whether an employer violates the National Labor Relations Act when he establishes a rule limiting communication among his employees on plant property concerning union organization and, at the same time, uses the very method of communication which he has forbidden to employees in conducting his own anti-union propaganda. Until recently such action had always been held by the National Labor Relations Board to constitute an unfair labor practice. This was true irrespective of the method of communication involved. In this case, however, the Board set forth a broad rule, applicable to all forms of solicitation, that management had the prerogative of establishing rules limiting solicitation which were not binding on its own anti-union activities. This conclusion was justified by the Board on the basis of the provision of the National Labor Relations Act guaranteeing the right of free speech, Section 8(c).

The same question has been considered, in the context of oral solicitation, in the Second and Sixth Circuits, as well as by the Court of Appeals in this case. The Second Circuit said that no issue of free speech was involved where a no-solicitation rule was disparately enforced. Judge Allen, in the Sixth Circuit, disagreed. The court below concurred with the Second Circuit and disagreed with Judge Allen's view.

The Board's brief on the merits here virtually confesses error as far as Section 8(c) is concerned. The brief argues,

⁴ Pet. p. 11, fn. 6.

instead, that the result reached by the Board here can be justified on the basis of the differences which exist between oral solicitation and the distribution of literature.

In view of this shift of position the brief for respondent in this case will present (1) argument on the Section 8(c) question which the Board and the Court of Appeals decided but which is now not pressed by counsel for the Board and (2) the reasons why we believe that the position now asserted by counsel for the Board is in error.

II.

Section 7 of the National Labor Relations Act provides that employees shall have the right to self-organization and to engage in other concerted activities for the purpose of mutual aid or protection. Although this language is absolute, the Act has been construed as permitting an employer to interfere with union organization by promulgating and enforcing rules governing employee conduct on his premises which are reasonably necessary to maintain discipline and permit efficient production. Thus, solicitation of any kind may be forbidden during the time employees are supposed to be working. In some establishments, such as a retail store, in which the requirements of the business so dictate solicitation may even be prohibited on the selling floor during non-working hours. But in the usual industrial plant, the employer may not forbid employees from soliciting for the union on non-working time. He may, however, under the present Board rule, prevent them from distributing literature in the plant proper, even on non-working time, in the interest of keeping the plant clean and orderly.

All of these rules may be lawfully enforced only on the assumption that their purpose is the maintenance of plant efficiency or discipline. Therefore, if an employer applies such a rule only against union adherents, while permitting employees opposed to the union, or outsiders, to solicit or distribute literature in a way forbidden to others, the Board and the courts have always concluded that the rule itself

is thus shown to be invalid. This requirement of non-discrimination applies even to rules forbidding distribution or solicitation on plant property by non-employees, as this Court recognized in *Babcock & Wilcox Co.*, 351 U.S. 105, 112.

The same result would seem to be required where it is the employer himself, rather than others, who are favored by disparate enforcement of the rule. Originally, the Board interpreted the Act as forbidding entirely any anti-union propaganda by the employer. The decisions of this Court, and the requirements of Section 8(c), which was inserted in the Act in 1947, however, made it clear that an employer was to be as free as the next man to participate in the campaign to determine whether the employees should select a union to represent them.

But the right to speak freely, given by Section 8(c), should not affect the established doctrine that a rule forbidding or limiting employee solicitation constitutes a violation of the Act unless it is applicable to all. And so the Board held in the first cases in which this issue was presented after the enactment of Section 8(c). In this case, however, it reached the opposite result in reliance on its prior decision in *Livingston Shirt Co.*, 107 NLRB 400.

The *Livingston Shirt* case itself was directly concerned with the Board's *Bonwit Teller* doctrine. In *Bonwit Teller, Inc.*, 96 NLRB 608, there were three factors: (1) a rule forbidding solicitation, even on non-working time, in a department store, (2) an anti-union speech by the employer to employees assembled for that purpose on company time and property, (3) a union request that it be given a similar opportunity to address the employees in such a meeting. The Board held not only that the combination of the no-solicitation rule and the speech by the employer on working time constituted an unfair labor practice but also that it was an unfair labor practice to deny the union's request that an audience of employees be assembled for an answering speech

by the union organizer. Subsequent to the *Bonwit Teller* case the Board applied this latter principle even in the absence of any no-solicitation rule.

In the *Bonwit Teller* case, the Second Circuit refused to enforce the portion of the Board's order which required that the union be given an equal opportunity to address the employees but agreed, Judge Swan dissenting, that the disparate enforcement of the no-solicitation rule constituted an unfair labor practice. The Board, however, continued to apply the full *Bonwit Teller* doctrine.

After the Board's personnel changed in 1953, the Board reversed the broad *Bonwit Teller* doctrine in the *Livingston Shirt* case, although it retained the doctrine for the special circumstances actually presented in the *Bonwit Teller* case. The opinion of two members of the Board in *Livingston Shirt* (which was the opinion relied upon in the present case) held that the grant of the right of free speech by Section 8(c) could not be conditioned by a requirement that the employer donate his premises and working time to the union for a reply to his speech. It retained, however, just such a requirement where the employer had invoked a broad no-solicitation rule covering non-working time. In the *Woolworth* case in the Sixth Circuit, Judge Allen used essentially the reasoning of the controlling opinion in *Livingston Shirt* as the basis for refusing to enforce a Board order where there was a broad no-solicitation rule. Judge Miller concurred, but only on the ground that, as he saw the facts, there had been no enforcement of the broad no-solicitation rule, and Judge McAllister dissented.

Although the precise holdings of the *Livingston Shirt*, *Bonwit Teller*, and *Woolworth* cases with respect to the duty of an employer to take the affirmative action of providing a "captive audience" for the union are not involved here, the reasoning of these cases cannot be distinguished. The theory expressed in *Livingston Shirt* and in Judge Allen's opinion in the *Woolworth* case, that Section 8(c) pre-

vents any finding of an unfair labor practice where an employer enforces a rule limiting employee communication but ignores that rule himself, would apply to rules against distribution as well as to rules against solicitation. But, we contend, that theory is plainly erroneous.

Section 8(c) guarantees free speech to employers. But it does not prevent a finding that an unfair labor practice has been committed when an employer has unfairly prevented his employees from speaking. The fact that the employer has spoken may be what makes the restriction on others unfair but it is the restriction which violates the Act, not the speech. This is plainly true when it is anti-union employees or third persons who are permitted to violate the rule. In such cases it is not the speech of the anti-union employees or the outsiders which constitutes an unfair labor practice but the fact that the restriction on employee communication, in conjunction with the permission granted to others to speak against the union, is interference with the employees' right of communication, guaranteed by the Act. If the theory of the Board, as expressed in *Livingston Shirt* and followed in this case is correct, then no unfair labor practice could be found where outsiders or anti-union employees were permitted to ignore a rule limiting solicitation or communication, for the right of free speech guaranteed by Section 8(c) is not limited to employers but is applicable to all.

III.

Unlike the Board itself, counsel for the Board here argue that Section 8(c) does not provide a uniform answer to the broad question of whether an employer can properly limit employee communication in the plant by a rule which does not apply to himself. The question, they say, is whether there are alternative methods of effective employee communication. In the case of oral solicitation, they urge, there is no adequate substitute. Hence, they say, such action by the employer does constitute an unfair labor practice where

the rule limits oral solicitation. In the case of distribution of literature, however, employees can distribute such literature just as effectively outside the plant gates as they can in the plant proper, and hence the employer's action is not a violation of the Act.

This reasoning washes Section 8(c) out of the case. It undermines, however, the basic premise concerning the relationship between employee organizational rights and the employer's property rights which has been fundamental to the entire course of court and Board decisions in the years since the Act was first passed. That premise is that no restriction may be placed on the employees' right to discuss self-organization among themselves on the plant premises unless the employer can demonstrate that such a restriction is necessary to maintain production or discipline. *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105 at 113.

Heretofore a showing of non-availability of other methods of communication has been applicable only to cases where it was sought to justify a requirement that non-employee organizers be given access to the plant or the parking lot. Counsel for the Board here, however, seek to make the same considerations apply to employees, who are in the plant with the employer's permission to do his work. Their major premise is that restrictions on such employee communication should be judged on the basis of the presence or absence of other channels of communication. Their minor premise is that employees can distribute literature as effectively off the premises as on. Under this view, it would follow that, even if a rule forbidding plant distribution were not justified by the necessity of plant production (as shown by the fact that the employer himself ignored it) still it would not violate the Act because of the alternative justification for the rule. The different result which the Board now argues for in the case of oral solicitation would follow because of the assumed absence of any satisfactory alternative to such solicitation on plant premises.

Both premises, we believe, are in error. The major premise is contrary to the terms of the Act and all of the precedents under it. It ignores the fact that channels of communication are not alternative but cumulative. This is graphically demonstrated in this case by the fact that the company found it desirable and useful to distribute anti-union propaganda inside the plant despite the fact that it also distributed such propaganda to the employees by mail.

Counsel for the Board justify their departure from the established conceptions in this area by interjecting the notion that an employer is entitled to use his ownership of the plant property as a weapon in the contest concerning union organization so long as he does not use that ownership to cut off channels of employee communication. This same basic approach, although not expressed by the Board here, does underlie the decision in *Livingston Shirt*. In that case the Board permitted an employer to restrict employee solicitation on working time while using working time for his own anti-union solicitation. This, the Board said, was not a violation of the Act since any disparity in the opportunity to discuss the union question which resulted was a consequence of the employer's ownership of the property and of the working time.

This conception of the relationship between property rights and the organizational rights guaranteed by the Act contradicts the whole tenor and purpose both of the Wagner Act and of the Taft-Hartley Amendments. As this Court recognized in *NLRB v. Stowe Spinning Co.*, 336 U.S. 226, the Act places requirements upon an employer with respect to freedom of employees on plant property which are quite distinct from the rights of employees with respect to other property of the employer. Taft-Hartley was supposed to equalize the rights of employers and unions. The Board did say, in *Livingston Shirt*, that the recognition of the employer's rights to use his own property (viz., the plant) and deny it to employees, in propagandizing against the union

did not involve any inequality because the union had the right to use its own property (viz., the union hall) to propagandize for the union. But this is horse and rabbit stew equality.

The minor premise of the Board's argument is, of course, relevant only if the major premise is acceptable. And we therefore do not believe that the Court is even required to pass on it. A brief examination of the considerations involved in the distribution of literature, however, shows that there are many reasons why it is not true that such distribution can as effectively be conducted at the plant gates as it can in the plant itself. In any case, the assertion by counsel for the Board that there is a substantial equivalence between the two methods of distribution is flatly contradicted by the findings of the Trial Examiner in this case. We do not, however, urge the Court to base its decision on these considerations, but rather urge that it reaffirm the rule that no restriction on employee communication on plant property is permissible, irrespective of the presumed existence of alternatives, unless there is a showing that the restriction is necessary to maintain production or discipline. Since no such showing can be made in this case because of the employer's actions in himself distributing anti-union literature, both established precedent and elementary considerations of fairness require affirmance of the decision of the Court of Appeals.

ARGUMENT

I.

INTRODUCTORY STATEMENT

This case presents to this Court, for the first time, the problem of interpretation of the National Labor Relations Act which is created when an employer simultaneously: (1) establishes a rule in his plant limiting communication

among each other by employees about the union, and (2) uses the plant premises for his own anti-union communication. This problem has a number of variants, depending upon the scope of the rule inhibiting employee communication and the nature of the employer's anti-union communication. In one form or another, the problem has agitated the Board and the lower courts since 1947. But, until recently, one simple proposition seemed to be true: an employer could not prevent employees from using, on their own time in the plant, the same method of communication which he himself, or his supervisors, used against the union. Any such discriminatory action seemed plainly to be an interference proscribed by the Act with the right of employees to self-organization.

This proposition was true whatever the method of communication involved. Differing rules had been developed, to be sure, with respect to the extent to which a uniformly enforced rule limiting communication could be lawfully promulgated—the difference depending upon whether the communication was oral or written, and whether the persons restricted were employees or non-employee organizers. But the principle that a rule, whatever its proper extent, must be uniformly applicable to both sides did not depend on the particular kind of communication involved.

In this case, the Board decided that the requirement of uniformity of application did not apply to the employer. It said flatly that

"valid plant rules against solicitation and other forms of union activity do not control an employer's actions. Management prerogative certainly extends far enough so as to permit an employer to make rules that do not bind itself. Otherwise, an employer can only enforce a rule he promulgates so long as he conducts himself according to the rule."

In setting forth this rule, the Board did not distinguish between oral solicitation and the distribution of literature. To the contrary, it relied primarily upon its prior decision in the *Livingston Shirt* case,⁵ which involved oral solicitation rather than the distribution of literature, and the views with respect to Section 8(c) of the Act there set forth. Indeed, the Board went to great pains to specify that, in its opinion, the result, which it believed to be dictated by Section 8(c), applied equally to oral solicitation and the distribution of literature.

The issue presented here, therefore, is much broader than the disparate enforcement of no-distribution rules. It involves the basic question of whether the Act permits an employer, either by virtue of Section 8(c) of the Act or by virtue of his inherent management prerogatives, to convert the working place into a forum to which he, but not his employees, can have access.

Until the time counsel for the Board filed their brief on the merits in this Court the question has usually been considered to present difficulties only with regard to Section 8(c). Section 8(c) says, in substance, that non-coercive employer communication on the union question shall not constitute an unfair labor practice. The question presented was whether, in the light of that Section, the employer's in-plant non-coercive communication can be regarded as an unfair labor practice if he forbids employee in-plant communication of the same kind.

That question had been considered, prior to this case, in two Courts of Appeals. In *Bonwit Teller, Inc. v. National Labor Relations Board*,⁶ the Second Circuit held that "neither Section 8(c) nor any issue of 'employer free speech' is involved" in the case of disparate enforcement of a rule forbidding oral solicitation on company premises. If an em-

⁵ 107 NLRB 400.

⁶ 197 F. 2d 640; cert. denied, 345 U. S. 905.

ployer chose to avail itself of the privilege of banning solicitation, the Court said, it was "required to abstain from campaigning against the union on the same premises to which the union was denied access." 197 F. 2d at 645. Judge Swan dissented.

The same issue also came before the Sixth Circuit in *NLRB v. Woolworth Co.*, 214 F. 2d 78, again in the context of oral expression rather than the distribution of literature. In the *Woolworth* case Judge Allen, speaking for herself alone, expressly disagreed with the views of the Second Circuit and concurred with Judge Swan's dissent in the *Bonwit Teller* case. In her view, Judge Swan was correct in holding, in her words, "that Section 8(c) has direct and controlling application and that a no-solicitation rule cannot cut down the rights given the employer under Section 8(c)."⁷ Judge Miller concurred in the result, although not in Judge Allen's opinion. Judge McAllister dissented.

In this case, too, in the Court of Appeals the "close and elusive" question (R. 108) related to Section 8(c). The Court concluded, however, that on that issue it agreed with the prior holding of the Second Circuit and disagreed with the opinion of Judge Allen in the Sixth Circuit (which it erroneously stated to be the opinion of the Circuit itself).

It was on the basis of this conflict that the Board petitioned for certiorari. In that petition it said:

"the effect of the decision below is that an employer may not simultaneously exercise his unfettered right under Section 8(c) to express his non-coercive opinions and his right, also well settled, to limit employee *solicitation and distribution* in the plant. The contrary view, set forth in *Woolworth*, preserves both rights." (P. 8, emphasis added.)

In the brief which they have now filed on the merits,

⁷ 214 F. 2d 78, 81.

counsel for the Board have virtually confessed error with respect to Section 8(c). They no longer contend that the view "set forth in *Woolworth*" is correct, and they no longer argue that the issue here concerns the relationship between Section 8(c) and "no distribution (and, by analogy, no solicitation)' rules."⁸ With respect to oral solicitation, they concede, the employer cannot forbid his employees to solicit on the plant premises on non-working time and simultaneously use those premises to solicit against the union, and Section 8(c) is irrelevant. "Section 8(c) affords the employer no immunity here, for the vice lies not in the employer's speech but in the fact that he has deprived the employees of their normal right to use plant premises for solicitation during working hours and has then taken advantage of that deprivation for his own anti-union purposes."⁹

But, they argue, this does not resolve the present case because different considerations apply with respect to the distribution of literature. Employees can distribute literature outside the plant gates. Therefore, they say, the employer's action in forbidding them to distribute inside the plant, while doing so himself, does not have the same inhibitory effect upon the exercise of the self-organizational rights guaranteed by Section 7 as would similar action with respect to oral solicitation and, hence, a different result must follow.

This is a new argument. In the Court of Appeals, the case was argued, and decided, on the basis that the statute must be identically applied to both forms of dissemination. And certiorari was requested on the basis of an alleged conflict between the decision of the court below (involving distribution of literature) on the one hand and the *Woolworth* decision in the Sixth Circuit and Judge Swan's dissenting opinion in the Second Circuit (both involving oral solicitation) on the other. Now we are told that *Woolworth* is

⁸ Petition, p. 9.

⁹ Bd. Brief, p. 39.

wrong (and wasn't really the view of the Sixth Circuit), that Judge Swan is wrong, and, by implication, that the Board's reliance on Section 8(c) is wrong. But, the Board's order, we are told, was nevertheless correct.

This shift of position poses a dilemma. The Section 8(c) question posed by the petition for certiorari is an important one on which there is a conflict among the circuit judges, if not the circuits. And it does have broad application to all forms of employer and employee communication. At the same time, however, the Court has before it the rationale advanced by the attorneys for the Board in this Court and presumably it must also decide whether this new view can be urged to sustain the result reached by the Board in this case even though the reasoning adopted by the Board in reaching that result be disavowed.

Our argument in this case, therefore, must be a double one. We think that, despite the Board's present disavowal of its own decision with respect to Section 8(c), we are obliged to present to the Court full argument in support of our position that the view of that Section taken by the court below was correct, even though such argument is not really responsive to the Board's brief. We are also obliged, of course, to present the reasons why the views now advanced by the Board cannot properly be sustained.

Accordingly, our argument in this case must necessarily be divided into two major branches. In the first branch we will present substantially the argument which we presented to the court below in support of the general proposition that the Board erred in holding that Section 8(c) gives management a broad prerogative to establish and enforce rules against employee solicitation, either oral or written, which are not applicable to its own anti-union solicitation. In the second branch we will present the reasons why we believe that the position now asserted by counsel for the Board is in error.

II.

THE COURT OF APPEALS CORRECTLY HELD THAT SECTION 8(c) DOES NOT PREVENT A RULE FORBIDDING UNION SOLICITATION OR DISTRIBUTION IN THE PLANT BY EMPLOYEES WHICH IS NOT APPLIED TO THE EMPLOYER HIMSELF FROM CONSTITUTING A FORBIDDEN INTERFERENCE WITH EMPLOYEE SELF-ORGANIZATION.

1. *The Applicable General Principles.* In the absence of statutory or contractual limitations there would be no question that management's prerogative extended far enough so as to permit an employer to make virtually any kind of rule as to the conduct of employees on the employer's premises. If so minded, an employer could discharge employees for joining a union. He could forbid them to solicit for a union or to solicit against a union, whether on working time or on non-working time. He could establish rules as to what the employees could say or what they should wear. He could permit some employees to violate the rules and enforce them against others. And he could observe or violate these rules himself with impunity. The plant is his property and the employees are his employees.

But the National Labor Relations Act, in Section 7, provides in absolute terms that employees shall have the right "to self-organization, to form, join or assist labor organizations . . . and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." Section 8(a) (1) of the Act makes it an unfair labor practice for an employer to interfere with, restrain, or coerce his employees in the exercise of the rights guaranteed in Section 7. And Section 8(a)(2) makes it unlawful to interfere with the formation of a labor organization.

The provisions of the federal Act obviously limit the employer's right to govern what activities employees may engage in on his property. Read literally and absolutely, the Act would seem to say that he can make no rules of any

kind, which would "interfere with . . . his employees in the exercise of the rights guaranteed in Section 7" "to join or assist labor organizations . . . and to engage in other concerted activities for the purpose of collective bargaining . . ." But, of course, the Act has not been construed as preventing the employer from promulgating and enforcing rules governing employee conduct on his premises which are reasonably necessary to maintain discipline and permit efficient production, even though such rules might interfere to a certain extent with self-organization by the employees.

In order for the rules to be valid, however, a showing must be made that they are necessary. The question is not whether the interference with activities protected by Sections 7 and 8 of the Act is so serious as to overcome the employer's property rights. At least as far as employees are concerned,¹⁰ the only question is whether the interference can be justified on the basis of the needs of efficient production. As the Court said, in the *Babcock & Wilcox* case, at p.113:

"No restriction may be placed on the employees' right to discuss self-organization among themselves, unless the employer can demonstrate that a restriction is necessary to maintain production or discipline."

The principle is the same, whether the discussion is in the form of oral argument or the distribution of literature. Indeed, this Court's statement above quoted, which appears on its face to refer to oral discussion, was made in a case involving the distribution of literature and was bottomed on *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, which actually involved the distribution of union cards and the wearing of union buttons.

Of course, the kind of rule which can be justified on the basis of the necessities of production necessarily depends on

¹⁰ Cf. *NLRB v. Babcock & Wilcox Co.*, 351 U. S. 105 (1956).

the kind of employee communication which is governed by the rule, as well as upon the kind of work being done on the premises. We turn now, therefore, to examination of the particular rules which have been evolved by the Board and the courts based on these factors.

2. *The Particular Rules.* The most important rule derived from the above considerations is simply that an employer can, without violating the Act, forbid union solicitation during the time when employees are supposed to be working. "Working time is for work" and not union activity, the Board has said. On the other hand, an employer cannot promulgate and enforce a rule prohibiting union solicitation by employees, even on company property, during non-working time such as luncheon or rest periods, or before or after actual work begins. Such a rule, in the absence of a showing that special circumstances make it necessary to maintain production or discipline, "must be presumed to be an unreasonable impediment to self-organization." *Peyton Packing Co., Inc.*, 49 NLRB 828, 843, (1943), quoted with approval in *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 804.

Certain businesses are of such a nature, however, that solicitation by employees even on non-working time can reasonably be prohibited. The nature of a retail establishment is such, the Board has said, that an employer can properly prevent union solicitation on the selling floor even during periods when the employees are not actively working. *J. L. Hudson Co.*, 67 NLRB 1403 (1946); *Marshall Field*, 34 NLRB 1 (1941); *Goldblatt Brothers, Inc.*, 77 NLRB 1262 (1948).

If, as in the present case, the solicitation of employees is not oral but takes the form of distribution of printed literature there is an additional factor to be considered. Even if the distribution is done on non-working time, handbills and circulars do tend to litter the property. And it can reasonably be argued that an employer has a legitimate

interest, irrespective of his attitude toward unions, in preventing such littering. The Board therefore held, at least up to 1944, that it was not unreasonable for an employer to prohibit distribution of handbills and similar literature within the plant itself whether such distribution was made on working time or on the employee's own time.

In *LeTourneau Company of Georgia*, 54 NLRB 1253 (1944), the Board was faced with a variant on this situation. In that case the rule against distribution applied not only to the plant itself but also to the Company's parking lot. Here too, the employer had an interest in preventing littering and the Board found that the rule was non-discriminatory, and had been established long prior to the Union's campaign, for the specific purpose of preventing littering. But it also found that the geography of the plant was such that distribution of literature to the employees was virtually impossible unless it was permitted on the Company's parking lot. Hence, balancing the employer's right to keep his property clean on the one hand against the employees' right to receive information to enable them to exercise their right to self-organization on the other, the Board determined that the enforcement of the no-distribution rule on the Company's parking lot constituted a violation of the Act.

The Court of Appeals for the Fifth Circuit reversed. This Court, in turn, reversed the Fifth Circuit and ordered that the Board's order against enforcement of the no-distribution rule be enforced. In so doing, it specifically noted that the rule against distribution of literature had been adopted to control littering and pilfering on the parking lot and that "there was no union bias or discrimination by the Company in enforcing the rule." Unlike the Board, however, this Court found that there was no "evidence or . . . finding that the plant's physical location made solicitation away from the Company property ineffective to reach prospective union members." Nevertheless, the Court ordered enforce-

ment of the Board's order. *NLRB v. LeTourneau of Georgia*, 324 U.S. 793, 797, 799 (1945).

In a companion case, decided together with *LeTourneau*, the Court came to the same conclusion with respect to a rule which had been applied to prevent an employee from distributing union cards in the plant lunch room. *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945).

This Court thus in both cases sustained Board orders based on special circumstances even though it specifically said there were no special circumstances. This result led the Board for a time to take a stricter attitude toward no-distribution rules. In *American Pearl Button Co.*, 56 NLRB 613, the Board had issued an order requiring an employer to rescind his rule against the passing out of "petitions" on Company property, without limitation to the parking lot. The Board's order was enforced by the Eighth Circuit in *NLRB v. American Pearl Button Co.*, 149 F. 2d 258 (C.A. 8, 1945). Then, in *American Book-Stratford Press*, 80 NLRB 914 (1948) and in *Chicopee Manufacturing Company of Georgia*, 85 NLRB 1439 (1949), the Board found a violation of the Act in the promulgation of a rule prohibiting the distribution of literature *within* the plant.

In neither of the latter two cases was there any showing that distribution of union literature at other times and places was impractical. Indeed, the Board seemed to take the position that the burden was upon the employer to establish the existence of special circumstances showing that distribution of union literature within the plant would have endangered the efficiency or production of the plant.

Beginning in *Newport News Dress Co.*, 91 NLRB 1521, (1950), however, the Board withdrew somewhat from this position. In that case the Board refused to find that a no-distribution rule violated the Act, referring not to the Supreme Court decision in the *LeTourneau* case but to its own decision in which the special geography of the plant was relied upon in justification for outlawing the no-distribution

rule. And in *Carolina Mills*, 92 NLRB 1141 (1951), the Board affirmed a Trial Examiner's report which found that the Company violated the Act by denying the Union the privilege of distributing literature on the premises only because distribution off the premises was not effective. Finally in *Monolith Portland Cement Co.*, 94 NLRB 1358 (1951), the Board overruled the *American Book-Stratford Press* case and the *Chicopee Manufacturing Corp.* case and made it clear that an employer "can lawfully prevent the distribution of literature in the plant proper, even during the employee's non-working time, in the interest of keeping the plant clean and orderly, at least where it is not evident that such activity cannot readily be conducted effectively somewhere off the employer's premises."¹¹

¹¹ Oddly enough, the court decisions with respect to the distribution of literature support the stringent rule which the Board sometimes adhered to between 1945 and 1951. In addition to the *LeTourneau* and *Republic Aviation* cases in this Court, there are decisions in the courts of appeals which explicitly upheld the Board's right to set aside any no-distribution rules covering the plant proper unless the employer could show some special justification for such a rule. In addition to the *American Pearl Button* case, already cited, the Seventh Circuit expressly said that "an employer may not prohibit employees from distributing union literature upon his premises during non-working hours except under exceptional circumstances which are not shown in this case." *American Furnace Co.*, 158 F. 2d 376, 380 (1946). There is a strong dictum in the Fourth Circuit to the same effect in *Maryland Drydock Co. v. NLRB*, 183 F. 2d 538 (1950). There the Court of Appeals was faced with a situation in which the employer had forbidden the Union to distribute certain specific union literature on its premises. The Board found the Company guilty of violating the Act but the court refused to enforce the Board's order because of the insulting nature of the literature, which it said was "manifestly destructive of plant discipline." The court, however, conceded that the union had a right to distribute proper union literature on the Company's premises. Indeed, it said that "if the Company should refuse to permit the union to distribute proper literature on the premises the Board unquestionably has the power, upon a finding to that effect, to issue a cease and desist order and protect the right of the union to do so." 183 F. 2d at 542. In *N.L.R.B. v. Carolina Mills*, 190 F. 2d 675 (1951) the Fourth Circuit enforced a Board order based in part, it said, on the simple refusal to permit in-plant distribution of union literature.

All of these cases have involved employee activity. They all serve to illustrate the basic principles set forth above that the only permissible restrictions on union solicitation, whether oral or printed, by employees on the employer's property (or elsewhere for that matter) are those justified by the necessity of maintaining plant efficiency or discipline. The difference between the earlier Board cases dealing with the distribution of literature and the rule definitively announced in *Monolith Portland Cement Co., supra*, was that the earlier cases seemed to require evidence in the individual case to show the circumstances creating the necessity of prohibiting distribution in the interests of keeping the plant clean and orderly while, in *Monolith*, the Board said that such necessity would normally be assumed.

In none of the cases was the rule justified because the employer owned the plant property. The fact that the activity in question takes place on his property is immaterial. The employees are there by his invitation to perform his work. They cannot, under the Act, be deprived of the opportunity of using this most natural place to disseminate information concerning union organization so long as they do not interfere with the purpose for which they are there—performing the work.

3. *The Uniform Requirement That a Rule, to Be Valid, Must Apply to All.* It follows, and until this case had always been held, that what might otherwise be a valid rule against solicitation or distribution constitutes a violation of the Act if it is discriminatorily applied. If an employer permits employees to solicit against a union on company time and enforces a no-solicitation rule only against union adherents it is clear that the rule's purpose is not the efficient conduct of his business but interference with the statutory right to organize and assist unions. In such a case the justification for the interference with communication which is involved in any rule against solicitation fails and the

rules violates the Act.¹² Thus, in cases in which the employer would ordinarily be permitted to establish a broad no-solicitation rule, applicable even during non-working time, the fact that he failed to apply this rule when the solicitation was against the union would destroy the justification for the rule and establish that its imposition was an unlawful interference with the rights of the employees.¹³

Similarly, in cases involving the distribution of literature, it has always been assumed that the employer's rule, to be valid, must be evenly applied. In all of the cases in which rules limiting employee distribution were upheld, the Board's approval has always been based on the assumption—usually explicitly stated—that the rule was applied non-discriminatorily in the light of its purpose and that its purpose was not to favor one side or the other on the union question but to prevent littering.¹⁴

Where discrimination has been found, the Board's answer has, at least until this case, been very simple. The fact of discrimination destroys the justification for the rule and establishes that it constitutes interference with the right of the employees to communicate with each other concerning union organization in the most natural forum. Where discrimination has been found neither the Board nor the courts have had the slightest hesitancy in finding a violation of

¹² *Macon Textiles, Inc.*, 80 NLRB 1525 (1948); *NLRB v. Peyton Packing Co.*, 142 F. 2d 1009 (1944); *Lindley Box & Paper Co.*, 73 NLRB 553 (1947); *Jacques Power Saw Co.*, 85 NLRB 440 (1940).

¹³ In *May Department Stores*, 59 NLRB 976 (1944), enforced 154 F. 2d 533 (C.A. 8, 1946), the Board simultaneously established its definitive rule that all solicitation on the selling floor of a retail establishment could be banned, and found a violation of the Act because such a rule was discriminatorily enforced.

¹⁴ "The restriction on the distribution of literature was not discriminatorily enforced." *Tabin-Picker & Co.*, 50 NLRB 928, 930 (1943); *Goodyear Aircraft Corp.*, 57 NLRB 502 (1944); *North American Aviation*, 56 NLRB 959 (1944).

the Act, even if in the absence of such discrimination the employer's rule would be proper.¹⁵

In view of the uniformity of both Board and Court opinion as to the illegality under the Act of the discriminatory application of no-solicitation or no-distribution rules, we think that it is clear that it is not within "management's prerogative" under the Act to deny the right to engage in such activities to union adherents, while granting the same right to those opposed to the union—whether they be employees or "the businessmen of Red Bud," as in *American Furnace Co.*, 158 F. 2d 376, 379 (C.A. 7, 1946).

The same principle of non-discrimination applies even to non-employee distribution or solicitation. Here, at least since this Court's decision in *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105, the shoe is usually on the other foot. With respect to employees, who are on the employer's property with his permission and to do his work, no restrictions are permissible unless justified by the necessities of production or discipline. With respect to non-employees, however, *Babcock & Wilcox* held, the employer may normally forbid access to the property or the right to distribute literature, unless it can be shown that special circumstances exist which prevent the union from reaching the employees through

¹⁵ Thus in *Macon Textiles, Inc.*, 80 NLRB 1525 (1948), the employer had a rule against solicitation on working time. Such a rule is ordinarily proper. But the Board found that the rule had been enforced only against union adherents and not against anti-union employees. The Board, therefore, in accordance with its well-established rule, found that the employer had violated the Act by discriminatorily enforcing its rule. See also, e.g., *Glen Raven Silk Mills, Inc.*, 101 NLRB 239 (1952); *NLRB v. American Furnace Co.*, 158 F. 2d 376 (C.A. 7, 1946); *NLRB v. William Davies Co.*, 135 F. 2d 179 (C.A. 7, 1943); *NLRB v. Peyton Packing Co.*, 142 F. 2d 1009 (C.A. 5, 1944), cert. denied 323 U. S. 730; *American Thread Co.*, 101 NLRB 1306 (1952). In the *American Thread* case, the Court of Appeals for the Fifth Circuit refused enforcement only because, on examination of the record, it found that there was no disparate enforcement of the rules. 210 F. 2d 381, 382, 383 (1954).

other available channels of communication. See, e.g., *N.L.R.B. v. Lake Superior Lumber Co.*, 167 F. 2d 147 (6th Cir., 1948); *N.L.R.B. v. Waterman SS Co.*, 309 U.S. 206, 224, and the cases cited in *Republic Aviation Corp. v. N.L.R.B.*, 324 U.S. 793, 799.

But even the right to limit distribution by non-employees is subject to the requirement of non-discrimination. As this Court said, in the *Babcock & Wilcox* case, an employer may forbid such distribution on his property, absent special circumstances, only "if the employer's notice or order does not discriminate against the union by allowing other distribution." 351 U.S. at 112.

What of the employer himself? Can the employer himself engage in working time solicitation or within the plant distribution, or order his supervisors to do so, while simultaneously forbidding such activity to his employees? At first sight, the answer plainly would seem to be no. If it offends the Act to forbid employees to speak or distribute while allowing anti-union outsiders to do so, it would seem to follow a *fortiori* that the Act is offended when the favored group are supervisors, distributing anti-union literature or company union announcements. Yet the Board in this case, Judge Allen in the *Woolworth* case and Judge Swan in the *Bonwit Teller* case, came to the conclusion that employers have a special prerogative to advance their own anti-union arguments in a forum which, under all the precedents, they must deny to all if they deny to any. To understand how this conclusion is reached—and its error—we must turn to consideration of the "free speech" provision of the Act—Section 8(c).

4. Employer Free Speech. An NLRB election campaign, after all, is concerned with determining whether the employees wish to have a union represent them in dealing with the employer. It is a controversy as to what method the employees shall use in dealing at arm's length with the employer. It can be very well argued that it is improper

for the employer to inject himself into this controversy. Furthermore, the employer is the boss. In the absence of a union contract, he has discretion as to how he hires, fires, grants or withholds "merit" increases, promotes and demotes. His arguments against a union may have force with the employees, not because of the persuasiveness of what he says, but because of the hidden coercive powers implicit in his position as employer.

Considerations such as these led the National Labor Relations Board early in its history to say that any serious anti-union propaganda by an employer constituted unlawful interference with his employees' self-organization rights. Employer expressions of opinion were regarded as having special, coercive, implications because they were *employer* expressions. In the words of Gerard Reilly, dissenting in *Clark Bros. Co.*, 70 NLRB 802, 809 (1946), *enforced* 163 F.2d 373 (C.A. 2, 1947):

"Until recent years this Board had always assumed that an employer had no right to express his opinions to his employees with respect to a union which might be seeking to act as their representative. Numerous decisions of the Board laid down the principle that it was the duty of an employer to remain completely neutral so far as his utterances in the plant were concerned. Consequently, any appeals by employers against unions or in favor of particular unions which were made in verbal addresses to the employees or reduced to written form and distributed on plant bulletin boards, in handbills, or in envelopes which reached the workers were considered to be violations of Subsection 8(1) of the Act, on the theory that such arguments were 'an interference' with the right of self-organization guaranteed to employees by Section 7 of the Act."

This line of decision reached an end, however, when this Court made it crystal clear that employer expressions of opinion were protected by the First Amendment as "free

speech." *NLRB v. Virginia Electric Power Co.*, 314 U. S. 469 (1941). And see *Thomas v. Collins*, 323 U. S. 516, 537 (1945), noting with approval *NLRB v. American Tube Bending Co.*, 134 F. 2d 993 (C.A. 2, 1943) *cert. denied* 320 U. S. 768.

Following these rulings the Board abandoned its requirement of neutrality and conceded that employers were free to express their opinions on the union question. In the *Clark Bros.* case, *supra*, however, the Board found that when an employer compelled his employees to listen to an anti-union speech he did violate the Act—not because of his speech but because of the compulsion to listen.

At this juncture Congress intervened. In Section 8(c) of the 1947 amendments to the Act it was provided that

"The expressing of any views, argument or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act; if such expression contains no threat of reprisal or force or promise of benefit."

Senator Taft described this provision, on the floor of the Senate, in the following words:

"Mr. President, on page 16 the bill contains a provision guaranteeing free speech to employers. That provision in effect carries out approximately the present rule laid down by the Supreme Court of the United States. It freezes that rule into the law itself, rather than to leave employers dependent upon future decisions." 93 Cong. Rec. 3837 (1947).

The report of the Senate Committee, however, indicated that something more than confirmation of the Supreme Court's decisions may have been intended. Specifically, the Committee said that the Board had limited the effect of the Supreme Court's decisions by its "captive audience" doctrine in the *Clark Brothers* case and by other cases in which

speeches were held coercive "if the employer was found guilty of some other unfair labor practice, even though severable or unrelated." These decisions were too restrictive, the Committee said, and Section 8(c) was intended to correct them. Senate Report No. 105 on S. 1126, 80th Cong., 1st Sess. (1947) pp. 23-24.

The net effect of Section 8(c), then, was at the least to confirm this Court's earlier "free speech" rulings, or at the most to outlaw the Board's *Clark Bros.* doctrine and the use of unrelated unfair labor practices to convert uncoercive speech into forbidden speech. If we give Section 8(c) the broadest possible significance, the most that can be said for it is that it removed from the employer, finally and definitely, any restriction on his freedom of utterance which might be found to inhere in his status of employer. As so read, Section 8(c) says that even if an employer is guilty of other unfair labor practices and even if he requires the employees to listen to him, still his speech—whether written or oral—is to be regarded just as if it were an outsider's expression of opinion. The employer is to be as free as the next man.

But this, surely, does not mean that he is to be more free than the next man. He is no longer required to be neutral. He can enter the anti-union lists and become an active participant in the campaign. The rules which placed special restrictions on him because he is the employer are statutorily eliminated. But the fact that his speech is free does not give him the right to restrict the speech of others.

5. *Free Speech and No-Distribution and No-Solicitation Rules.* We are now ready to tie these threads together. The cases on no-solicitation and no-distribution rules established that even though such rules did to some extent interfere with the organization of unions and the other rights guaranteed by Section 7 of the Act, such rules were not in themselves unlawful, if properly limited, if they were neces-

sary to the efficient conduct of the employer's business. The area in which such rules could lawfully operate depended, to a measure, upon the particular circumstances. But, whatever the permissible area, the rules were always subject to the condition that they be non-discriminatorily applied. If the employer permitted anti-union employees or third persons to violate the rules he could not lawfully enforce them against pro-union employees. If he did, the prohibition against soliciting or distribution—not the anti-union solicitation or distribution—lost its privileged status and was regarded as an unlawful interference with the employee's rights.

The fact that the employer is given the right to speak freely by Section 8(c) should not change this result. Discriminatory enforcement of the rules is still discriminatory, whether the favored individuals are anti-union employees, or third persons, or the employer himself. And so the Board and the courts have held until recently.

The first case in which the Section 8(c) issue was squarely decided was *Goodall Co.*, 86 NLRB 814 (1949). The Board there adopted, without even discussing the question, the Trial Examiner's report, which said:

"The issue presented by the foregoing evidence is not whether an employer has a right to prohibit union activity during working hours or to make speeches to employees during that time or to engage in anti-union propaganda. The question is whether he may reserve such rights to himself, while at the same time interfering with, or preventing, employees from talking about a union and soliciting members for it. It is well established that discriminatory conduct of that nature violates the statute. The Examiner finds that in engaging in anti-union activity during working hours and in authorizing and permitting supervisors and employees to do so, while prohibiting employees from soliciting membership for the Union and interfering

with discussion concerning it, during working hours, the Respondent discriminated against its employees and thus violated Section 8(a)(1). (86 NLRB 814 at 841-842.)

A similar result was reached, without discussion, in *Allen-Morrison Sign Co.*, 79 NLRB 904 (1948) (no-solicitation rule; supervisors solicited against union), *Kentucky Utilities Company, Inc.*, 83 NLRB 981 (1949) (same), and *Editorial "El Imparcial" Inc.*, 92 NLRB 1795 (1951) (same).

These cases and, in particular, the reasoning of the *Goodall* case would seem to dispose of this case. The Board here, however, came to the opposite result. It did so in reliance on its own decision in *Livingston Shirt Co.*, 107 NLRB 400 (1953). To understand the reasoning involved in this reliance it is necessary to digress and discuss briefly the history of the Board's *Bonwit Teller* doctrine and its ultimate reversal in the *Livingston Shirt* case.

6. *The Bonwit Teller Doctrine.* In *Bonwit Teller, Inc.*, 96 NLRB 608 (1951), the Board was faced with a department store in which a broad no-solicitation rule, covering non-working time, had been invoked, as is proper in such establishments. At the same time, the employer utilized the premises to make an anti-union speech on company time to a "captive audience." In addition, there was a union request, which the employer had denied, to address the employees in the same forum. If the "captive-audience" speech could be regarded as in violation of the no-solicitation rule, then it would seem to follow, on the basis of established precedent, that there was disparate enforcement of the rule and a violation of the Act.

The Trial Examiner so held¹⁶ and recommended an order derived from this holding. The Board, however, went further. It did not merely issue an order merely forbidding

¹⁶ 96 NLRB at 629-532.

the company to enforce its no-solicitation rule in a discriminatory manner. Instead, relying on a suggestion in the opinion of the Court of Appeals in the *Clark Brothers* case, 163 F. 2d 373, 376 (C.A. 2, 1947) the Board forbade the employer to make anti-union speeches to employees on company time and property unless he acceded to the union's request that it be provided a similar audience. In so doing, it relied upon a doctrine of equal opportunity "wholly apart from the disparate use of the no-solicitation rule." 96 NLRB at 612. This doctrine was that employees had a right, under Section 7 of the Act to hear both sides of the story under reasonably equal circumstances. Therefore, an employer who used the "captive audience" technique against a union unlawfully interfered with the employee's free choice if he did not affirmatively provide the union an equal opportunity to reply in the same way.¹⁷

The *Bonwit Teller* case quickly became the *Bonwit Teller* doctrine, and was applied by the Board in the absence of a broad non-working time no-solicitation rule¹⁸ and, indeed, in the absence of any no-solicitation rule at all.¹⁹ It received, however, only limited acceptance in the courts. The decision of the Board in the *Bonwit Teller* case itself was approved by the Second Circuit by a 2-1 vote, with Judge Swan dissenting, only on the limited ground relating to the discriminatory enforcement of the no-solicitation rule. The court refused to enforce that part of the Board's order which required the employer to provide equal opportunity to reply to "captive-audience" speeches. 197 F. 2d 640 (1952) cert.

¹⁷ 96 NLRB at 612.

¹⁸ See, e.g. *Higgins, Inc.*, 100 NLRB 829 (1952); *American Tube Bending Company*, 102 NLRB 735 (1953); *Gruen Watch Co.*, 103 NLRB 3 (1953).

¹⁹ See, e.g. *Biltmore Manufacturing Co.*, 97 NLRB 905 (1951); *Metropolitan Auto Parts Int.*, 99 NLRB 401 (1952); *Onondaga Pottery Co.*, 100 NLRB 1143 (1952); *National Screw and Manufacturing Co.*, 101 NLRB 1360 (1952).

denied 345 U. S. 905. In *NLRB v. American Tube Bending Co.*, 205 F. 2d 45 (C.A. 2, 1953) Judge Learned Hand made clear his view as to the limited nature of the Second Circuit's earlier decision—upholding a Board order against the discriminatory enforcement of an unlawfully broad no-solicitation rule but stating clearly that, in the absence of such a rule, the employer was under no duty to provide an audience for the union. Judge Swan concurred, under constraint of the majority opinion in *Bonwit Teller*. Judge Frank on the other hand disagreed with Judge Hand's narrow interpretation of the *Bonwit Teller* decision.

Despite this limited judicial acquiescence in the *Bonwit Teller* rule the Board continued to apply it broadly. See *Metropolitan Auto Parts, Inc.*, 102 NLRB 1634 (1953). There the matter stood until, after the elections of 1952, there was a change in the personnel of the Board.

As a result of this change, there emerged the decision in the *Livingston Shirt* case upon which the Board relied here. In *Livingston Shirt* there was a narrow no-solicitation rule, prohibiting solicitation only during working hours. The employer delivered speeches to employee assemblies during working hours just prior to an election urging a vote against the union. The Board, by a divided vote held that this was not a violation of the Act. It explicitly reversed the *Bonwit Teller* doctrine although not the *Bonwit Teller* case.

Chairman Farmer and Member Rogers, the two new members of the Board, rested their decision primarily on the free speech provisions of Section 8(c). They said that the grant of this right in Section 8(c) could not be conditioned by a requirement that the employer who exercises it must donate his premises and working time to the union for the purpose of propagandizing the employees. They did not disagree with the premise of the equality of opportunity doctrine but held that that doctrine's requirements were met because the employer could address meetings in the plant and the union could address meetings in the union

hall. Member Peterson concurred in the result, but not in the opinion. In his view, Section 8(c) and free speech had nothing to do with the case. He concurred, nevertheless, on the sole ground that the Board's broad application of the *Bonwit Teller* case had not received Court approval. Member Murdock dissented.

The majority in the *Livingston Shirt* case did retain one part of the *Bonwit Teller* doctrine: the specific holding in the *Bonwit Teller* case. Even in the view of the majority it would still be an unfair practice for an employer to deny a union opportunity to reply to a captive audience speech if the employer enforced a broad no-solicitation rule governing non-working time, whether that rule was valid, as in retail stores, or not.

This retention of the specific holding on the *Bonwit Teller* case seemed to be inconsistent with the view that Section 8(c) of the Act forbids the Board to condition the exercise of employer free speech on the nonenforcement of a rule limiting employee speech, and that inconsistency was promptly noted when the Board sought enforcement of its order in just such a case. *NLRB v. Woolworth Co.*, 214 F. 2d 78 (1954). In that case the Sixth Circuit, after the *Livingston Shirt* decision, refused to enforce the Board's order. There were three opinions. Judge Allen, speaking almost in the language of the new members of the Board, said that a no-solicitation rule, no matter what its scope, cannot cut down the right of free speech. If the no-solicitation rule was valid, for the reasons found by the Board, the fact that the Company made a speech to the employees on company time could not make it invalid in light of the provisions of Section 8(c). Judge Allen flatly disagreed with the Second circuit's *Bonwit Teller* decision and agreed with Judge Swan's dissent. Judge Miller concurred in the refusal to enforce the Board's order requiring that a captive audience be provided the union, particularly in view of the Board's *Livingston Shirt* case. He did not, however, con-

cur in Judge Allen's refusal to condemn discriminatory enforcement of a broad no-solicitation rule. As to that, he said that the rule against solicitation on non-working time had not been enforced against employees and, hence, was not involved. Judge McAllister dissented.

7. *The Application of Livingston Shirt to This Case.* The precise holdings of the *Livingston Shirt*, *Bonwit-Teller*, and the *Woolworth* cases with respect to the "captive audience" question are not involved here. In those cases the request denied by the employer was a request by a union organizer (not an employee) that the employer take the affirmative action of assembling the employees on company premises in order to hear a speech by the organizer. In this case, on the contrary, the union's grievance is not that the employer should distribute leaflets for it—although the employer did both mimeograph and distribute leaflets for the company union which was organized after the election. The grievance of the union here is simply that the employer refused to permit the employees to distribute their own leaflets in the plant, during non-working time, while supervisors were being directed to distribute anti-union leaflets on the same premises.

But, we concede, the reasoning of these cases with respect to Section 8(c) cannot be distinguished. The *Bonwit Teller* case says that there is no issue as to free speech where a no-solicitation rule is found to be discriminatorily enforced because the employer violates it. Judge Allen's opinion in *Woolworth* and the Board's opinion in *Livingston Shirt* hold, to the contrary, that the presence of a no-solicitation rule cannot limit employer free speech. The reasoning, in each case, is equally applicable to the no-distribution rule involved here. In that respect, at least, we agree with the Board's opinion in the present case. But, for the reasons already indicated, and those set forth below, we believe that the Second Circuit is right and Judge Allen and the Board are wrong and we urge this Court so to hold.

8. *Conclusion.* We do not think that it will be disputed that an employer who permits anti-union employees, or third persons, to distribute literature and prohibits only the distribution of pro-union literature on his property violates the Act. Does Section 8(c), as the Board here held, require a different result when the distribution is made by the employer or his supervisors? Plainly, we think, not.

Section 8(c) guaranteed free speech to employers. But the right of an employer to speak has nothing whatever to do with whether he has unfairly prevented others from speaking. The fact that he has spoken may be what makes the restriction on others unfair but it is the restriction which violates the Act, not the speech.

This is most easily seen when the position of third persons (the "businessmen of Red Bud"), or of the anti-union employees is considered. They are entitled to free speech too. Of this there never was any doubt even before Section 8(c). And, if 8(c) does add anything to the right of free speech, it adds it equally to the rights of employees and third persons, since the section is not limited to employers.

It must follow, then, if the right to speak is determinative, that all of the cases in which it has been held that the employer violated the Act because he permitted third persons and anti-union employees to speak, while preventing others, are wrong. After all, the businessmen of Red Bud came on the employer's property with his permission. Employees are there by virtue of the invitation of the employer. They have the full right to use the employer's property if he gives it to them. They also have the right to speak and, by Section 8(c), that speech cannot constitute an unfair labor practice. Therefore—on precisely the same reasoning as the Board has used—it would rob Section 8(c) of meaning to condition their right to speak on the non-enforcement of the no-solicitation or no-distribution rule as to others.

This is plainly nonsense. But, we submit, it is the same nonsense as that contained in the Board's opinion here and

the opinion in the *Woolworth* case. It will not do to answer, as the Board's brief here does, at pp. 30-31, by saying that in these other cases "the employer has given direct economic assistance to one rival union group and withheld it from another." This is, first, not true, and, second, irrelevant to the Board's argument. The "businessmen of Red Bird" were not a rival union group in *American Furnace Co.*, 158 F. 2d 376, nor were the employees who opposed any union in the cases cited *supra* at notes 12-15. In any case, if Section 8(c) forbids the Board to find an unfair labor practice in an employer's communication on plant property, it is difficult to see why it does not also prevent the finding of an unfair labor practice where others do the speaking with the employer's permission.

To put the matter in another way, if it is true, as Judge Aiken says, that no conditions can be attached to the right of free speech guaranteed by Section 8(e), then the employer here has interfered with the pro-union employees' right of free speech by denying to them the privilege of distribution within the plant, as well as the rights guaranteed by Section 7. But we have conceded that the Board can balance the interests of all parties in free speech with the needs for efficient operation of the plant. It can permit the imposition of a proper no-distribution rule. But, by the same token, it cannot be said that the employer's right of free speech is limited by insisting that the rule—if it is to exist—be applied to all.

III

THE THEORY ADVANCED BY COUNSEL FOR THE BOARD IN THIS CASE IS WHOLLY WITHOUT MERIT AND CONTRADICTS THE ENTIRE PHILOSOPHY OF THE FEDERAL ACT.

1. *The Theory of the Board's Brief.* In our argument above we have set forth, in perhaps more detail than is required, the established Board doctrines with respect to no-solicitation and no-distribution rules as they have been ap-

plied by the Board and the courts over the years to a variety of factual situations. We have done so primarily to show the error of the Board in relying on Section 8(c) and the correctness of the decision below.

The discussion of the development of the various Board rules with respect to solicitation and distribution also serves, we believe, to underline the extent to which counsel for the Board, in their argument in this Court, have departed, not only from the Board's decision in this case, but also from the underlying premises which have governed these questions since the federal Act was passed.

We have already pointed out in our Introductory Statement, that the argument now advanced by counsel for the Board is quite different than the simple 8(c) theory expressed by the Board itself and by Judge Allen in *Woolworth* and Judge Swan in *Bonwit Teller*. That theory simply is that if a rule limiting solicitation or distribution is valid, then no solicitation or distribution by the employer or his supervisors can make it invalid, since Section 8(c) provides that employer expression of opinion shall not constitute an unfair labor practice. In this view, the nature of the rule or of its infraction by the employer, is immaterial, and the same principle applies to no solicitation and no-distribution rules. In our argument above we have agreed that the nature of the rule is immaterial. But we have urged that, as the Court of Appeals held in this case, when a rule, permission to establish which is "engrafted upon the statute, is not applicable to a given employer, the unrestricted prohibition of the statute against interference with employee activities comes into play" and the rule itself is invalid.
(R: 109)

The brief which counsel for the Board have filed here appears to compromise the question. Unlike either the Board itself or the court below, counsel now argue that no uniform answer can be given. Whether or not employer communication which contravenes a rule limiting employee com-

munication in the plant is an unfair labor practice, they say, depends upon the nature of the rule. If the rule is one forbidding oral solicitation on non-working time, employer solicitation on plant property is a violation of the Act and Section 8(c) is irrelevant. On the other hand, if the rule is one forbidding employee distribution of literature within the plant on non-working time, employer distribution within the plant is not an unfair labor practice but is protected by Section 8(c). The difference between the two situations, counsel for the Board say, lies in the fact that printed material can be distributed elsewhere but there is no adequate substitute for oral solicitation on plant property.

As must be readily apparent, this reasoning in effect washes Section 8(c) out of the case. If the test is, as counsel for the Board now assert, whether other channels of communication are adequate, then the fact that an employer communication is alleged to be one element of the unfair labor practice is not determinative. The answer is the same whether or not one believes that Section 8(c) is applicable.

The new position now asserted by counsel for the Board may seem, superficially, to be a more moderate position than that asserted by the Board itself. On analysis, however, it undermines the basic premise concerning the relationship between employee organizational rights and the employer's property rights which has been fundamental to the entire course of court and Board decisions in the years since the National Labor Relations Act was first passed. And it is supported by no citation of authority, either from the Board or from the courts, except possibly the 1953 Board decision in the *Livingston Shirt* case.²⁰

The basic premise upon which our entire argument here has been based, and upon which the decision of the Court of Appeals below was based, was the established rule, expressed in literally scores of cases, both in the Board and in

²⁰ 107 NLRB 400.

the courts, that no restriction on the employees' right to discuss self-organization among themselves was permitted under the Act unless it could be demonstrated that the restriction was justified by the necessities of plant operation. Only a year ago, this rule was stated flatly by this Court in *NLRB v. Babcock & Wilcox Co.*:

"No restriction may be placed on the employees' right to discuss self-organization among themselves, unless the employer can demonstrate that a restriction is necessary to maintain production or discipline. *Republic Aviation Corp. v. Labor Board*, 324 U. S. 793, 803." 351 U. S. at 113.

Prior to the *Babcock & Wilcox* case, the Board had applied this same rule not only to employee activity but also to non-employee organizers. But this Court, in *Babcock & Wilcox*, established that "a different consideration" applied in the latter case. With respect to non-employees, this Court said, there is a question as to whether a restriction established by the employer would have the effect of placing employees beyond the reach of reasonable union efforts to communicate with them." If such conditions were shown to exist, then the restriction might violate the Act; Otherwise, the restriction as to non-employee organizers would be assumed to be valid: The distinction between the rules applicable to employees and non-employees, this Court said, is "one of substance." *Id.*

What counsel for the Board have attempted to do in this case is, in substance, to make the rule which this Court has said must be applied to non-employees now also apply to employees. The "critical consideration"²¹ which counsel for the Board now assert was overlooked by the Court of Appeals is that interference by the employer with distribution of literature can be justified, not only by demonstrating that such restriction is necessary to maintain production by pre-

²¹ Bd. Brief, p. 11.

venting littering of the plant, but also by the fact that adequate avenues exist for employee distribution of literature outside the plant. Therefore, counsel for the Board argue, the fact that the Company in this case demonstrated, by ordering its supervisors to engage in precisely the kind of distribution forbidden by its rule, that the elimination of littering was not the purpose of the rule is still insufficient. The rule can still be regarded as valid because employees can effectively distribute literature at the plant gates and, hence, the rule does not have the effect, in this Court's words, of placing "employees beyond the reach of reasonable union efforts to communicate with them."

The major premise of the Board's entire brief is thus that limitations on employee communication on plant property may be justified not only by the necessities of production or discipline but also by the existence of alternative methods of employee communication. Even if no justification is shown, a rule limiting employee solicitation may be valid if other channels of communication are open. To this major premise are added two minor premises: (1) that there is no satisfactory alternative to oral discussion among employees on plant property, and (2) that in the case of the distribution of literature, there is a satisfactory alternative in the presumed ability of employees to distribute literature with equal effectiveness either inside or outside the plant gates. From these premises it follows quite logically that when an employer forbids oral solicitation on the plant premises but engages in such solicitation himself he violates the Act. But when the employer forbids the distribution of literature within the plant but distributes his own anti-union literature in the plant there is no violation.

We do not quarrel with the logic. We quarrel with the premises, both major and minor:

2. *The Board's Major Premise.* It should be clear already that the Board's major premise is in clear contradiction to the terms of the National Labor Relations Act and

all of the precedents which have been developed under it. The Act says, in no uncertain terms, that any interference by the employer with the rights guaranteed to employees by Section 7 of the Act is an unfair labor practice. The absolute terms of the statute have been modified by interpretation to permit employers to limit what are clearly activities protected by Section 7, but only if it can be shown that such limitation is necessary. A showing that the employees can engage in other Section 7 activities, or even the same Section 7 activities, off the plant premises has never been regarded as sufficient to justify a rule preventing such activities on the plant premises.

Methods of communication are not alternative but cumulative. It is not a sufficient answer, when an employee is deprived of the right to communicate either orally or in writing with another on the question of union organizing to say that such communication can take place at a different place or by a different method. In the absence of the restriction it could take place in both. By eliminating one of the many forms which union organizational activity takes, the employer interferes with rights protected by Section 7 of the Act. Therefore, such interference is a violation of the Act, even if other methods of communication are open, unless the employer can justify that interference in terms of the necessities of his industrial operation. Any other view is the equivalent of telling an advertiser who can advertise in one newspaper he is deprived of nothing if he can't advertise in another. Obviously union organizational efforts use many channels, oral solicitation within the plant, visits to workers in their homes, meetings in the union hall; distribution inside the plant, and, as the Board brief says, "distribution at plant gates, distribution by mail, distribution to the employees at their homes or at the union hall,"²² to name only a few.

²² Bd. Brief, p. 41.

But, as the employer's actions in this very case show, the existence of one channel does not destroy the utility of others. NuTone mailed at least eleven anti-union circulars or letters to its employees during the election campaign (R. 61, 64-65). It still felt it desirable and useful also to distribute eight pieces of anti-union propaganda inside the plant. Its action in so distributing, in addition to mailing, clearly shows that its ban on employee distribution limited the effectiveness of employee organizational activity even though the employees or the union also had other methods of distribution. And such interference, unless justified, violates the Act.²³

How do counsel for the Board justify their departure from a proposition as clearly established as the one discussed above? They do so by interjecting a conception which runs contrary to the entire course of Board and court decision in the years since the National Labor Relations Act was first passed. That conception is that an employer is entitled to use the fact that he owns the plant property and can make rules concerning its use as a weapon in the contest to determine whether the employees will vote to be represented by a union. His property rights, not the necessities of production or discipline, are what justify his actions and he is entitled to use those property rights against union organization so long as he does not cut off the channels of employee communication while preserving only his own. So long as he does not go that far, any disparity in the rules applicable to employees and the actions which the employer himself takes are justified, not by the necessities of production, but

²³ The cumulative effect of using different methods of communication is well recognized by employers. See Johnson & Johnson, Inc., *Guiding Rules for Communications*, reprinted in Baker, Ballantine and True, *Transmitting Information Through Management and Union Channels* (Princeton University, Industrial Relations Section, 1949) p. 134.

by the fact that it is the employer's property on which all of this activity takes place.

It is this basic approach which explains *Livingston Shirt*, 107 NLRB 400. In the view of two of the members of the Board in that case, the fact that an employer called the employees together on working time to deliver a lecture against unionism, while at the same time forbidding employees to discuss unionism on working time, did not involve any violation of the Act, since, after all, it was his plant and he was paying for the working time. It was all right for him to say that "working time is for working," as far as employee solicitation is concerned and, at the same time, to direct the employees to stop work and to listen to his anti-union speech. This, the Board said, was not an unfair labor practice so long as the channels of communication were left open by permitting the employees to discuss the union question on their non-working time. Any unfairness or disparity in the opportunity to discuss the union question which might exist as the result of the combination of the no-solicitation rule and the employer's use of working time to solicit against the union was justified, they believed, because it was a consequence of the employer's ownership of the property and of the working time. The Union, the Board said, retained equality of opportunity because it could deliver speeches in the union hall.

Similarly, in this case what counsel for the Board essentially argue is that the employer's right to forbid the distribution of union literature on his premises, while forbidding the employees from doing the same thing, is a proper consequence of the fact that the employer is entitled to use his ownership of the property as justification for his use of a method of solicitation which is forbidden to the employees. Again, as in *Livingston Shirt*, the only restriction is that the employees should have some other channels of communication and any unfairness or disparity in opportunity which may result from the simultaneous imposition of the rule and

the employer's non-observance of it is to be ascribed to his lawful use of his own property and is not to be regarded as a violation of the act.

We think it plain that this whole conception of the relationship between property rights and the National Labor Relations Act is erroneous. It is contradicted by the whole tenor and purpose of the Act. The purpose of the Wagner Act, clearly, was to facilitate employee organization and it was precisely to assure that employers would not use the fact that they are the employers, and do own the plant property and do pay for the working time, to inhibit efforts at union organization. In 1947 the Act was amended. But the premise of the amendment was "that a fair and equitable labor policy can best be achieved by equalizing existing laws in a manner which will encourage free collective bargaining." S. Rep. No. 105, 80th Cong., 1st Sess., p. 2. Clearly, the proposition that employers can use the fact that they are employers, that they own the premises and pay for the working time, to interfere with the efforts of their employees to organize themselves is not part of any program of equality.

We are not talking here, be it noted, about "private property unconnected with the plant," as in *NLRB v. Stowe Spinning Co.*, 336 U.S. 226, 229. Even with respect to such property, this Court held in *Stowe Spinning*, the Board may find a requirement of non-discrimination under the special circumstances existing in a company-dominated mill town. But here we are talking about the place of employment itself. As all members of the Court in *Stowe Spinning* recognized, there is a "distinct line of cleavage as to the rights of employees between facilities and means of production open to use of employees through their employment contract and other property of the employer." 336 U.S. at 240. The Board, in *Livingston Shirt*, however, recognized no such distinction. Permitting the union to address the employees on

plant property; after the employer had done the same, the Board said, would be requiring him "to donate his premises" to the union.

The Board did say, in *Livingston Shirt*, that it recognized the principle that employees are entitled "to hear both sides under circumstances which approximate equality." 107 NLRB at 406. But that equality was to be achieved, it said, by allowing each side the exclusive use of its own private property: the employer could use the working place for anti-union speeches because he owned it, and the union could "assemble and address employees" in the union hall. This is horse and rabbit stew "equality"!

3. *The Board's Minor Premise.* The minor premise of the argument now made by counsel for the Board—that employee distribution can take place as effectively on the street outside the plant as it can inside the plant—is relevant, of course, only if counsel's major premise is accepted. And since this major premise formed no part of the Board decision in this case there is neither discussion nor finding with respect to this second proposition in the Board's opinion. Indeed, the only conclusion with respect to this proposition which is contained in the record is the statement of the Trial Examiner that the Company in this case was "openly and flagrantly campaigning against the Union in the normal arena, and the most effective one for reaching the employees . . . while simultaneously denying access to it by the Union." (R. 20, emphasis added.) This statement, of course, is in flat contradiction to counsel's present assertion, on page 42 of their brief, that the employees here were "not prejudiced" because "adequate avenues for employee distribution existed off plant premises."²⁴

But, it seems, Board counsel do not seek to rely on any

²⁴ Bd. Brief, p. 42.

particular evidence or finding in the record. They assert as a general proposition that "a pamphlet or circular can be handed to an employee as readily when he enters or leaves the plant as when he is in the plant."²⁵ As a general proposition this is simply not true. And we do not know of any court or Board decision which indicates that it is true. It can be asserted with such assurance only by one who has never had the experience of trying to hand leaflets to employees rushing through the plant gates and finding that the major portion of the proffered leaflets are simply brushed aside or dropped unread.

Nor is it true, as stated by counsel, that organizational literature "is designed to be retained by the recipient for his perusal at his convenience."²⁶ As anyone who has had experience with such literature knows it is most effective if it is of such arresting nature as to cause the recipient to read it when it is given to him and, indeed, that if it is not of that nature, it is usually not read at all.²⁷

These are just a few of the reasons why it is simply not the same thing to hand literature out at the plant gates and to distribute it in the plant during rest periods, lunch hours or other non-working time.²⁸ As the Company here recognized

²⁵ Bd. Brief, p. 23, 11.

²⁶ Bd., Brief, p. 22.

²⁷ The Handbook of Trade Union Methods published by the International Ladies Garment Workers Union advises that a leaflet intended to be distributed at the plant gates "where it may be given a hurried glance and throw down" should concentrate on two or three important ideas put in type that is easily read. See also Peters, *Communication Within Industry* (1949), p. 135.

²⁸ There are many other reasons. For one thing, workers tend to regard acceptance of a piece of literature handed out at the plant gates as likely to indicate that they accept the union and, hence, for reasons of fear or otherwise, many will refuse to accept literature which they would take if it were distributed to all within the plant. Also, distribution in many cases is directed to particular groups of employees who work together—as in the case of a craft election—and it is usually impossible to limit plant gate distribution to such employees. The same kind of problem exists where, as in the garment industry, many shops occupy the same building.

by using plant distribution in addition to mailing, distribution of literature to employees while at their place of work and when they have immediate opportunity not only to read it but also to discuss it among their fellow workers has advantages not obtainable in any other way.²⁹

As a matter of fact, it is not entirely clear to us how counsel for the Board even assert that it is reasonably possible for employees effectively to distribute literature to other employees outside the plant gates. Presumably, in a one-shift operation, the employees desiring to distribute literature will be required to enter and leave the plant at approximately the same time as the other employees in order that they be at their jobs at the appointed times. Under the view now set forth they must, somehow, leave work early or race out of the plant before the other employees so that they can stand at the gates before those employees leave and hand them leaflets, or, somehow, arrive late at their work stations so that they can remain at the plant gates distributing literature while the other employees go in.

Distribution by union organizers, or by employees who had been discharged for union activity, as in this case (R. 74-75), is of course subject to none of these difficulties. But again it is nonsense to suppose that distribution is as effective when done by outsiders, or by persons who are the visible evidence of what happens to union adherents, as it is when done by fellow employees in good standing, to say nothing of distribution by foremen and other supervisors. A worker is most likely to read something handed to him by his foreman, less likely to read something given to him by

²⁹ The advantage of discussion at the time of distribution is so plain as not to require demonstration. For experimental confirmation, see T. J. Dahle "An Objective and Comparative Study of Five Methods of Transmitting Information to Business and Industrial Employees" (Unpublished Doctoral Thesis, Purdue University, 1953) pp. 171 ff.

a fellow worker, and least likely to read something given him by an outsider or a discharged employee.³⁰

All of these considerations, we believe, effectively demolish the bland assumption by counsel for the Board that, really, the union wasn't hurt by the employer's actions here. We set them forth because counsel for the Board have raised the question, not because we believe that they are relevant or controlling, or that the Court should pass on them. They do serve, however, to show the kind of area and the kind of considerations which become involved if the major premise of Board's counsel is accepted. In no case dealing with the distribution of literature, so far as we are aware, have those considerations been discussed because in no case, with the possible exception of *Livingston Shirt*, has the major premise of Board's counsel been accepted.

The accepted rule, and the rule which this Court should again re-affirm, is that the only consideration, in deciding whether an employer's restriction of employee communication on plant property is valid, is whether it is demonstrated that the "restriction is necessary to maintain production or discipline." 351 U.S. at 113. Where, as here, the employer engages in precisely the conduct which he has forbidden to employees, both established doctrine and elementary considerations of fairness dictate the conclusion that the restriction against employee activity violates the Act.

³⁰ See Johnson & Johnson, Inc., *op. cit. supra*, p. 135; Peters, *Communication Within Industry* (1949) p. 174; Nixon, *Recent Developments in Employer-Employee Communications Research*, in *Communications in Employee Relations*. University of Minnesota Industrial Relations Center Research and Technical Report No. 14.

CONCLUSION

For the reasons above set forth, it is respectfully submitted
that the judgment of the court below should be affirmed.

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**RECEIVED IN THE CIRCUIT COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

U. S. DISTRICT COURT

FOR THE FIFTH CIRCUIT

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CITATIONS

Cases:

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In the Supreme Court of the United States

OCTOBER TERM, 1957

No. —

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

AVONDALE MILLS

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Solicitor General, on behalf of the National Labor Relations Board, prays that a writ of certiorari issue to review the judgment of the Court of Appeals for the Fifth Circuit entered on March 29, 1957, partially denying enforcement of an order issued by the Board against Avondale Mills (R. 124-130).¹

OPINIONS BELOW

The opinion of the court below, *infra*, pp. 11-16, is reported at 242 F. 2d 669. The findings of fact, conclusions of law, and order of the National Labor Relations Board (R. 60-102, 115-130) are reported at 115 NLRB 840.

JURISDICTION

The court below entered its judgment on March 29, 1957 (*infra*, p. 16), and denied a petition for reheat-

¹ "R" refers to the transcript of record; "B.A." and "R.A." refer to the appendices to the briefs filed by the Board and respondent, respectively, in the court of appeals.

ing on May 3, 1957 (*infra*, p. 21). The jurisdiction of this Court is invoked under 28 U.S.C. 1254, and Section 10(e) of the National Labor Relations Act, as amended.

QUESTION PRESENTED

Whether a rule prohibiting employees from engaging in pro-union solicitation during working hours, otherwise valid under the tests enunciated by this Court, is invalidly applied if the employer himself is engaging in unlawful, coercive, anti-union solicitation during working hours.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C., Secs. 151, *et seq.*), are as follows:

RIGHTS OF EMPLOYEES

Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

UNFAIR LABOR PRACTICES

Sec. 8. (a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * * * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization * * *

STATEMENT

I. The Board's Findings of Fact

A. Respondent counters a union campaign by invoking a rule against pro-union solicitation during working hours

In the fall of 1954, the Textile Workers of America, AFL-CIO, herein called the Union, began an organizational campaign at respondent's mills in Sylacauga, Pell City, and Alexander City, Alabama (R. 70-71, 74; B.A. 11-13). On November 10, 1954, the Union gave union membership cards to some 60 of respondent's employees working in two mills located in Sylacauga (*ibid.*).

Beginning November 11, the day after the distribution of union cards, respondent called a number of employees individually into the office of a management representative, and there read them the following statement (R. 116-117; B.A. 19-20, 91):

It has come to our attention that you are attempting to solicit union membership in this plant during working hours, or while the employees that you are attempting to solicit are at work. This is

a violation of plant rules and any future instances of this sort will result in prompt dismissal.

In each case the individual thus summoned had allegedly been soliciting for the Union; respondent did not publicize its anti-solicitation rule to the employees as a group (R. 117-118; B.A. 59, 19-20, 42-43, 76-77, 85, 108-110, 131-132, 135, 146-147).

B. Respondent, notwithstanding its rule against pro-union solicitation, engages through its supervisors in anti-union solicitation during working hours

Although respondent thus promulgated or revived a rule against campaigning for the Union during working hours,² its supervisory personnel engaged in anti-union campaigning while the employees were at work, threatening employees with loss of benefits and with a shutdown of the plant if the Union succeeded in organizing it. Thus Supervisor Cabiness told employee Dupree, while the latter was at work in the spinning room, that respondent "would never recognize the union . . . they would cut those frames up and sell them for junk before they would let the union come in" (R. 85; B.A. 107-108). Cabiness also told employee Price, in the tool room, that if the Union "came to Avondale Mills the mill would shut down" (R. 84; B.A. 98). Foreman Forbus told employee Rich, who was "running the creel job . . . at that time", that "If it goes union,

² The record contains conflicting testimony as to whether there had been, prior to the Union's organizing campaign, a plant rule against solicitation during working hours (B.A. 36, 44, 77, 82, 87, 90, 101, 105-106, 109, 118-119, 132-133, 136, 138-139, 141-145, 147-148, 151, 155).

this plant will shut down and we won't have any jobs" (R. 81-82; B.A. 18). In the same vein, Assistant Foreman Brooks told employee McCoy, who was "working at the time," that if the mill became unionized the employees would lose their "old age benefits, the hospital and the profit-sharing would be eliminated of course" (R. 87; B.A. 144). While employee Connell was at work, Foreman Forbus asked him what he thought he would gain by joining the Union, and said that "the mill would probably shut down if it went union down there" (R. 76; B.A. 83-84). Employee Bass' supervisor asked her, while she was working, what she thought about the Union, and whether all her people belonged to it (R. 87; B.A. 140). Respondent also sent a personnel clerk to solicit employee Jones' withdrawal from the Union; this solicitation likewise occurred while Jones was "on [his] job" (R. 93; B.A. 45).

C. Respondent enforces its rule against pro-union solicitation by discharging three employees

As noted above, early in November respondent had told several employees that they were not to engage in pro-union solicitation during working hours. Between November 16 and 18, respondent discharged three employees, Jones, Rich, and Parker, allegedly for violating the no-solicitation rule (R. 89-91, 94; B.A. 22-25, 46-47, 114-115). According to respondent's version of the three infractions, Rich was discharged for asking an elevator man if he wanted a union, an event which occurred while Rich was riding in the elevator on his way to obtain a box necessary to his work (R. 90; R. A. 38-39). Parker was discharged for asking an em-

ployee if he would sign a union card and for telling him why the Union would be good for the Company; this took place at a time when Parker had completed his work for the day and the other employee had just begun (B.A. 155-159). Jones was discharged for allegedly asking employee Nicholson whether he had filled in a card given to him on the previous day by employee Dupree outside the gate (B.A. 175-176).³

II. The Board's Conclusions and Order

The Board found that respondent violated Section 8(a)(1) of the Act by interrogating employees concerning their union membership, views, and activities; threatening them with loss of benefits, loss of employment and a plant shutdown, if the Union organized its mills; and soliciting employees to withdraw from the Union (R. 100, 116-117). The Board further found that respondent "was prompted to invoke the no-solicitation rule by a desire to prevent unionization of its employees rather than by consideration of plant production and efficiency," noting that "anti-union solicitation was not made an offense," and that respondent's supervisors engaged in anti-union solicitation during working hours by threatening employees with reprisal for union activities and interrogating them concerning their union membership and sympathies (R. 118, 119, 120). Having found that respondent's no-solicitation rule was discriminatorily invoked and applied, the Board concluded that the discharges of

³ When Jones, who denied violating the rule, asked his supervisor whom he could see to prove his innocence, he was told to "go see [the Union organizer]" (R. 83; B.A. 36, 47-48). The Board found that Jones had not engaged in the prohibited solicitation, and that in any event his discharge was caused by his other union activities (R. 122-123).

Jones, Rich, and Parker, allegedly for violating the rule, were violative of Section 8(a)(3) and (1) of the Act (R. 120).⁴ Finally, the Board concluded that even if the no-solicitation rule had been validly invoked and applied, the evidence with respect to Jones established that he was unlawfully discharged because of his adherence to the Union, and not because of his alleged violation of the rule (R. 121-123).

The Board accordingly ordered respondent to cease and desist from violating Sections 8(a)(1) and (3), to reinstate the three dischargees with back pay, and to post appropriate notices (R. 125-130).

III. The Decision of the Court Below

Noting that respondent did not challenge the Board's findings with respect to the coercive conduct of respondent's supervisors, the court below enforced the Board's order insofar as it rested upon respondent's unlawful threats and interrogation of employees (*infra*, p. 13). The court likewise agreed with the Board that respondent had unlawfully discharged Jones for union activity, and enforced the order insofar as it directed his reinstatement with back pay (*infra*, pp. 15-16). But, notwithstanding the coercive anti-union campaigning by the supervisors during working hours, the court below held that violation of the no-solicitation rule by employees furnished the company a valid ground for their discharge (*infra*, pp. 14-15). The court accordingly set aside the Board's order insofar as it directed respondent to reinstate Rich and Parker with back pay and to cease discriminatorily enforcing the no-solicitation rule (*infra*, pp. 15-16).

⁴ On this aspect of the case, the Board's conclusion was contrary to that which had been reached by the Trial Examiner. R. 97-99.

REASONS FOR GRANTING THE WRIT

1. The instant case presents another facet of the problem which this Court will examine in *National Labor Relations Board v. United Steelworkers of America, CIO, and NuTone, Incorporated*, No. 785, October Term, 1956, certiorari granted, 353 U. S. 921. In *NuTone*, the issue is whether an otherwise valid rule against the distribution of union literature in a plant is rendered invalid by the employer's own distribution of *non-coercive* anti-union literature.⁵ In the instant case, the issue is whether an otherwise valid no-solicitation rule is rendered invalid if the employer engages in *coercive* anti-union solicitation. The same considerations which prompted the grant of certiorari in *NuTone* should lead to a similar grant here.

Since the Court of Appeals for the District of Columbia Circuit concluded in the *NuTone* case⁶ that an employer's distribution of non-coercive anti-union literature during working hours is discriminatory when the employees are forbidden from disseminating pro-union literature under the same conditions, *a fortiori* that court would regard this respondent's ban on employee solicitation as invalid, for here the employer not only solicited but, in so doing, employed coercion.⁷

⁵ The question, as stated in the Government's *NuTone* petition (p. 2), is as follows: "Whether a rule prohibiting employees from distributing literature in the employer's plant, otherwise valid under the tests enunciated by this Court, becomes invalid if the employer, himself, is distributing literature setting forth his own, non-coercive views concerning unionization."

⁶ The *NuTone* opinion (not yet reported) is annexed to the petition in No. 785.

⁷ As the court below noted, respondent did not challenge the Board's findings as to the coercive conduct of respondent's supervisors (*infra*, p. 14). The statement in the opinion (*infra*,

There is thus an irreconcilable conflict between the Fifth Circuit's position in in the instant case and the District of Columbia Circuit's decision in the *NuTone* case. An affirmance by this Court in *NuTone* would necessitate reversal here. While the Board is of the view that the Court of Appeals went too far in *NuTone*,⁸ it seems plain that the position of respondent's employees (who are not parties to this suit and may not petition in their own right) should be protected until this Court has completed its review of *NuTone*.

2. We are of the view, moreover, that the decision below should be reversed irrespective of the outcome of the *NuTone* case. As already observed, this respondent's anti-union solicitation, conducted through its plant supervisors, was concededly coercive. Since such solicitation is, by any standard, unlawful, the employer, we believe, was precluded from relying upon its rules relating to solicitation as a basis for discharging employees who adopted the tactic of pro-union solicitation during working hours. Cf. *Republic Aviation*

p. 5) that no "solicitation in violation of the rule had ever been permitted" can refer only to employee solicitation, for the undisputed facts established that respondent, through its supervisors, urged employees to abandon their union, threatening them with loss of benefits if they did not (*supra*, pp. 4-5). These appeals by the employer constituted "anti-union solicitation", just as appeals to join a union and suggestions of benefits arising from membership constitute "pro-union solicitation" prohibited by respondent's rule. Since the facts as to the anti-union solicitation are unchallenged, the question whether respondent was precluded from relying on its rule in taking action against employees who solicited is strictly a legal one.

* In the *NuTone* petition (see p. 11, n. 6), the Solicitor General expressed no view as to the correctness of the Board's position, but urged that review by this Court was desirable in order to clarify the governing law in this field.

Corp. v. National Labor Relations Board, 324 U.S.
793, 805.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted and that the case should be set down for argument immediately following *National Labor Relations Board v. United Steelworkers of America, CIO, and NuTone, Incorporated*, No. 785, October Term, 1956, certiorari granted, 353 U. S. 921.

J. LEE RANKIN,
Solicitor General.

JEROME D. FENTON,

General Counsel,

STEPHEN LEONARD,

Associate General Counsel,

DOMINICK L. MANOLI,

Assistant General Counsel,

FREDERICK U. REEL,

Attorney,

National Labor Relations Board.

JULY 1957.

APPENDIX**IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

No. 16243**NATIONAL LABOR RELATIONS BOARD, PETITIONER,***versus***AVONDALE MILLS, RESPONDENT.**

Petition for the Enforcement of an Order of the
National Labor Relations Board, sitting at
Washington, D. C.

(March 29, 1957.)

Before HUTCHESON, Chief Judge, and RIVES and
BROWN, Circuit Judges.

RIVES, Circuit Judge: The National Labor Relations Board petitions the court for the enforcement of its order issued upon its decision reported at 115 N.L.R.B. 130.

In the fall of 1954, the Texile Workers Union began an organizational campaign at respondent's textile mills in Sylacauga, Pell City, and Alexander City, Alabama. The respondent employs approximately six thousand people in its nine textile mills located in seven communities in Alabama. The Eva Jane Mill and the Catherine Mill, located in Sylacauga where the respondent has its principal offices, are the ones here involved.

The respondent was organized in 1897. Its history and policies are described in a booklet entitled "An Introduction to Avondale", which recites:

"Avondale's conception of the human side of industry is progressive, dynamic—never static. It began when this business began, and has developed through the years, always endeavoring to keep pace with the nation's steadily advancing standard of living. This has found expression in a constantly broader appreciation of recreational, social, health, cultural, and security programs, all of which have been developed in cooperation with employee groups.

* * * * *

Avondale considers the relationship with its employees to be a partnership in which benefits and adversities are shared as all strive together to make the organization a better and more successful one. As is true in all partnerships, each individual should make his maximum contribution to the program."

The booklet, of some fourteen printed pages, describes what it refers to as Avondale's program for **profit-sharing, vacations, insurance, promotion, re-creation, community activities, educational program, etc.**; and refers to a smaller separate pamphlet entitled "**Procedure for Handling Employee Problems or Complaints,**" which details five steps an employee may take in bringing a problem or complaint from his assistant foreman up to and including the president of the company.

Other than the two pamphlets mentioned, the consistent policy of the company has been not to have written rules, but to rely upon rules and policies evolved from and proved workable in custom and practice, including a practice not to discipline an employee for violation of a rule until the rule had been

expressly called to his attention and he had been advised that future violations would result in discharge or discipline. Such matters as hours of work, lunch periods, order in the plant, quality standards, etc. were all regulated by custom and no written rules were posted in the plant. The Trial Examiner found, as the evidence shows: "The plant rules being unwritten, were matters of custom, some possibly dating back nearly 60 years."

The company makes no effort to prohibit general discussions of any matter whatever by employees in its plants during nonwork time. It has, however, prohibited solicitation within its plants during actual work time for any purpose, or cause, other than the annual Red Cross charity solicitation. As the Trial Examiner found, "The invoking of this rule against union solicitation and the subsequent discharge of employees alleged to have violated the rule constitutes the most important feature of this case."

The Trial Examiner found that,

"By interrogating its employees concerning their union sentiments and activities, soliciting employees to withdraw their membership cards from the Union, and threatening to close down the plant if the Union came in, and threatening to take out certain benefits, the Respondent interfered with, restrained, and coerced its employees in the exercise of the rights guaranteed in Section 7 of the Act, and thereby engaged in unfair labor practices within the meaning of Section 8 (a)(1) of the Act."

No exceptions to these findings were filed, and they were adopted by the Board. There is no defense to the Board's Order so far as it is based on such findings, and to that extent, of course, it is enforced.

The Trial Examiner further found that the General Counsel had failed to prove that the company, in violation of Section 8(a)(1) of the Act, either promulgated or invoked the rule against union solicitation for discriminatory reasons. He therefore concluded that the company did not violate Sections 8(a)(1) and (3) of the Act when it discharged employees Jones, Rich and Parker for violating this rule. The Board did not agree with such findings and conclusion, and further held that Jones' discharge was discriminatory in any event.

The issues here are: 1. Whether substantial evidence on the record as a whole supports the Board's finding that the company's no-solicitation rule was invoked and applied for discriminatory reasons, and 2., assuming that it was not, whether there is other substantial evidence to support the Board's finding that respondent discriminatorily discharged employee Jones.

There is and can be no dispute that the company had a right to prohibit union solicitation in its plant during working hours.¹ An otherwise valid no-solicitation rule, however, cannot be invoked or applied for a discriminatory anti-union purpose.² There was no dispute in the evidence that solicitation of union membership during work hours had interfered with production and plant efficiency, and that when that became obvious the company took action by making its em-

¹ Republic Aviation Corp. v. N.L.R.B., 324 U.S. 793, 797, 798, 803, n. 10, approving Peyton Packing Co., 49 NLRB 828, 843-844, enforced by this Court, 142 F. 2d 1009, 1010.

² Peyton Packing, *supra*; also N.L.R.B. v. William Davies Co., 7th Cir., 135 F. 2d 179, 181; certiorari denied 320 U.S. 770; Carter Carburetor Corp. v. N.L.R.B., 8th Cir., 140 F. 2d 714, 716-717; N.L.R.B. v. The Denver Tent and Awning Co., 10th Cir., 138 F. 2d 410.

ployees aware of the no-solicitation rule in the same manner that it made them aware of its other rules. That much the company had a right to do. The fact that the rule had not been posted on the bulletin board, or otherwise publicized, before the occasion for its use arose is consistent with the company's practice as to all of its rules. The evidence fails to establish that any solicitation in violation of the rule had ever been permitted. Nor does the fact alone that the company was opposed to the union, as was its lawful right, furnish substantial evidence of an unlawful and discriminatory purpose in invoking and applying its no-solicitation rule. On the first issue, then, we agree with the Trial Examiner, and find that there was no substantial evidence to support the Board.

On the second issue, whether employee Jones was, nevertheless, discriminatorily discharged, we think that the Board's findings, though contrary to those of the Examiner, are supported by substantial evidence on the record as a whole, and, hence, should be sustained by us. *N.L.R.B. v. Akin Products Co.*, 5th Cir., 209 F. 2d 109, 111. Jones was "the outstanding union adherent in the plant," according to the Trial Examiner. There was substantial evidence tending to establish the following facts: In addition to warning Jones and reading him the no-solicitation rule, the company sent its personnel clerk, Cleghorn, to make an appeal to him to stop his union activity. When discharged, Jones denied, with considerable reason, that he had solicited Nicholson, who had informed against him, and asked for a chance to prove his innocence. Instead, the foreman told him that he could go see Mr. Fred Halstead, the union organizer. When Jones appealed his discharge, he was met with similar remarks from the superintendent and from the general superintendent. Without detailing the other matters men-

tioned by the Board, we hold that there was substantial evidence to support its findings on this second issue.

In accordance with the foregoing opinion, the Board's order is in part enforced and in part denied enforcement.

ENFORCED IN PART AND DENIED IN PART.

JUDGMENT

Extract from the Minutes of March 29, 1957

No. 16243

NATIONAL LABOR RELATIONS BOARD

versus

AVONDALE MILLS

This cause came on to be heard on the Petition of the National Labor Relations Board for the Enforcement of an order of the National Labor Relations Board, made on March 20, 1956, the consolidated proceeding known upon the records of the Board as "Avondale Mills and Textile Workers Union of America, AFL-CIO, Cases Nos. 10-CA-2200 and 10-CA-2274," and was argued by counsel:

On consideration whereof, It is now here ordered, adjudged and decreed by this Court that the Order of the National Labor Relations Board in this cause be, and the same is in part enforced and in part denied enforcement.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 16243

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

AVONDALE MILLS, RESPONDENT

DECREE ENFORCING, IN PART, AN ORDER OF THE NATIONAL
LABOR RELATIONS BOARD

Before: HUTCHESON, Chief Judge, and RIVES and
BROWN, Circuit Judges.

By the Court:

This cause came on to be heard upon the petition of the National Labor Relations Board to enforce its order dated March 20, 1956. The Court heard argument of respective counsel on February 19, 1957, and has considered the briefs and the transcript of record filed in this cause. On March 29, 1957, the Court, being fully advised in the premises, handed down its decision enforcing in part and denying in part the Board's Order. In conformity therewith, it is hereby

ORDERED, ADJUDGED AND DECREED that the Respondent, Avondale Mills, Sylacauga, Alabama, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Discouraging membership in Textile Workers Union of America, AFL-CIO, or in any other labor organization of its employees, by discharging its employees or in any other manner discriminating against them in regard to their hire or tenure of employment

or any term or condition of employment, except to the extent permitted by Section 8 (a) (3) of the National Labor Relations Act (hereinafter called the Act).

(b) Interrogating its employees concerning their union membership, views, or activities in a manner constituting interference, restraint, or coercion in violation of Section 8 (a) (1) of the Act; threatening employees with loss of employment, loss of benefits, or a plant shutdown, if Textile Workers Union of America, AFL-CIO, organized its plant; and soliciting employees to withdraw their membership from the said Union.

(c) In any other manner interfering with, restraining, or coercing its employees in the exercise of their right to self-organization, to form labor organizations, to join or assist Textile Workers Union of America, AFL-CIO, or any other labor organization, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any or all such activities, except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment, as authorized in Section 8 (a) (3) of the Act.

2. Take the following affirmative action which the Board has found will effectuate the policies of the Act:

(a) Offer James M. Jones full and immediate reinstatement to his former or substantially equivalent position, without prejudice to his seniority or other rights and privileges, and make him whole for any loss of pay he may have suffered as a result of the discrimination, in the manner set forth in the section of the National Labor Relations Board's Decision and Order, dated March 20, 1956, entitled "The Remedy."

(b) Preserve and make available to the Board or its agents upon request, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of back pay due and the right of employment under the terms of the Decree.

(c) Post at its plants and offices at Sylacauga, Alabama, copies of the notice attached hereto marked "Appendix." Copies of said notice, to be furnished by the Regional Director for the Tenth Region of the National Labor Relations Board (Atlanta, Georgia), shall, after being duly signed by the Respondent's representative, be posted by it immediately upon receipt thereof, and maintained by it for sixty (60) consecutive days thereafter in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to insure that such notices are not altered, defaced, or covered by any other material.

(d) Notify the aforesaid Regional Director in writing, within ten (10) days from the date of this Decree, as to what steps it has taken to comply herewith.

Entered: May 20, 1957.

APPENDIX**NOTICE TO ALL EMPLOYEES PURSUANT TO**

a Decree of the United States Court of Appeals enforeing in part an order of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, as amended, notice is hereby given that:

WE WILL NOT discourage membership in Textile Workers Union of America, AFL-CIO, or in any other labor organization of our employees, by discharging any employees or in any other manner discriminating against them in regard to their hire or tenure of employment or any term or condition of employment, except to the extent permitted by Section 8(a)(3) of the National Labor Relations Act.

WE WILL NOT interrogate our employees concerning their union membership, views, or activities in a manner constituting interference, restraint, or coercion in violation of Section 8(a)(1) of the Act; threaten our employees with loss of employment, loss of benefits, or with a plant shutdown, if Textile Workers Union of America, AFL-CIO, organized our plant; or solicit employees to withdraw their membership from the said Union.

WE WILL NOT in any other manner interfere with, restrain, or coerce employees in the exercise of their right to self-organization, to form labor organization, to join or assist the above-named labor organization, or any other labor organization, to bargain collectively through representatives of their own choosing, or to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any or all of such activities, except to the extent

that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment, as authorized in Section 8(a)(3) of the Act.

WE WILL offer James M. Jones full and immediate reinstatement to his former or substantially equivalent position, without prejudice to any seniority or other rights and privileges previously enjoyed, and make him whole for any loss of pay suffered as a result of the discrimination against him in the manner set forth in "The Remedy" section of the National Labor Relations Board's Decision, dated March 20, 1956.

All our employees are free to become, remain, or to refrain from becoming or remaining, members of Textile Workers Union of America, AFL-CIO, or any other labor organization, except to the extent that this right may be affected by an agreement authorized by Section 8(a)(3) of the Act.

AVONDALE MILLS,

(Employer)

Dated, _____

By _____

(Representative) (Title)

This notice must remain posted for 60 days from the date hereof, and must not be altered, defaced, or covered by any other material.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 16,243

NATIONAL LABOR RELATIONS BOARD, PETITIONER
versus
AVONDALE MILLS, RESPONDENT

Petition for the Enforcement of an Order of the
National Labor Relations Board, sitting at Wash-
ington, D. C.

(May 3, 1957)

ON PETITION FOR REHEARING

Before HUTCHESON, Chief Judge, and RIVES and
BROWN, Circuit Judges.

PER CURIAM:

The petition for rehearing in the above styled and
numbered cause is hereby

DENIED.

LIBRARY
FEDERAL BUREAU OF INVESTIGATION

U. S. DEPARTMENT OF JUSTICE
FEB 13 1957

JOHN T. FEY, CHIEF

No. 289

In the Supreme Court of the United States

October Term, 1957

NATIONAL LABOR RELATIONS BOARD, PETITIONER,

v.

AVONDALE MILLS

BY WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE FIFTH CIRCUIT

MOTION FOR THE NATIONAL LABOR RELATIONS BOARD

J. EDWARD RANICKI,

Solicitor General,

Department of Justice, Washington 25, D. C.

JAMES M. BYRNE,
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In the Supreme Court of the United States
OCTOBER TERM, 1957

No. 289

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

AVONDALE MILLS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

OPINIONS BELOW

The opinion of the court below (R. I., 131-135)¹ is reported at 242 F. 2d 669. The findings of fact, conclusions of law, and order of the National Labor Relations Board (R. I., 60-83, 115-130) are reported at 115 NLRB 840.

¹ The record, as re-bound for this Court, consists of three parts: (1) the pleadings, Trial Examiner's intermediate report, Board decision and order, and proceedings in the court below; (2) excerpts from the transcript of testimony printed as an appendix to the Board's brief in the court below; (3) excerpts from respondent's appendix in the court below. References to these three parts will be designated "R. I.", "R. II.", and "R. III.", respectively.

JURISDICTION

The court below entered its judgment (R. I, 135) on March 29, 1957, and denied a petition for rehearing on May 3, 1957 (R. I, 139). The petition for a writ of certiorari was granted on October 14, 1957. The jurisdiction of this Court is invoked under 28 U. S. C. 1254, and Section 10 (e) of the National Labor Relations Act, as amended.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C., Secs. 151, *et seq.*), are as follows:

RIGHTS OF EMPLOYEES

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a) (3).

UNFAIR LABOR PRACTICES

SEC. 8. (a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization * * *

QUESTION PRESENTED

Whether a rule prohibiting employees from engaging in pro-union solicitation during working hours, otherwise valid under the tests enunciated by this Court, is invalidly applied if the employer himself is engaging in unlawful, coercive, anti-union solicitation during working hours.

STATEMENT

I. THE BOARD'S FINDINGS OF FACT

A. RESPONDENT COUNTERS A UNION CAMPAIGN BY INVOKING A RULE AGAINST PRO-UNION SOLICITATION DURING WORKING HOURS, AND BY THREATS OF REPRISAL FOR UNION ACTIVITY

In the fall of 1954, the Textile Workers of America, AFL-CIO, herein called the Union, began an organizational campaign at respondent's mills in Sylacauga, Pell City, and Alexander City, Alabama (R. I, 70-71, 74; II, 11-13). On November 10, 1954, the Union gave union membership cards to some 60 of respondent's employees working in two mills located in Sylacauga (*ibid.*).

Beginning November 11, the day after the distribution of union cards, respondent called a number of employees individually into the office of a management representative, and there read them the following statement (R. I, 116-117; II, 19-20, 91):

It has come to our attention that you are attempting to solicit union membership in this

plant during working hours, or while the employees that you are attempting to solicit are at work. This is a violation of plant rules and any future instances of this sort will result in prompt dismissal.

In each case, the individual thus summoned had allegedly been soliciting for the Union. Respondent did not publicize its antisolicitation rule to the employees as a group, and the employees had not been aware of it prior to the November 11 warning interviews (R. I, 117-118; II, 59-60, 19-20, 43-44, 76-77, 85-87, 109, 132, 135-136, 147). Thus, not only the employees specifically warned (R. II, 36, 44, 77, 87, 90, 101, 109, 118, 132, 136, 147), but other employees called as witnesses at the hearing (R. II, 82, 106, 139, 141, 142, 144), testified that they were never apprised of any rule against solicitation until after the start of the Union's campaign. Cathlene Sneed, an employee of 22 years' service with respondent, and Autrey McCoy, who had worked for respondent for 15 years, both testified that they had never known or heard of any rule against solicitation (R. II, 138, 139, 143-145). Only one supervisor, Gunter, testified that any such rule pre-dated the Union's campaign and he stated that he had never seen "a written rule, but it is an inferred rule" (R. I, 117, n. 2; II, 451). Only one employee, respondent's witness McCain, testified that he knew soliciting was against plant rules, stating that he had never "read the rules, but [had] heard the talk before" (R. I, 117; II, 155).

The warnings against solicitation were accompanied in several cases by other antiunion expressions. Thus

Superintendent Pasley, in the course of warning Fitzsimmons, told him that the Company would not stand for the Union's coming in, and could shut down if it did (R. I, 79; II, 134). Pasley similarly accompanied his warning to Epperson by adding that unionization of a nearby mill had resulted in a shutdown and blacklisting of the employees, who were not even able to sell their homes (R. I, 78; II, 90, 162). The day before Rich was warned against solicitation, Foreman Forbus inquired into Rich's union views and predicted that if the organizing drive succeeded the plant would close (R. I, 81-82; II, 18); and a few days after the warning, Foreman Gunter asked Rich not to solicit for the Union outside the plant (R. I, 82, 118; II, 21-22). In similar fashion, Foreman Phurrough, a few days after reading the no-solicitation warning to Jones, sent a personnel clerk to tell Jones to stop all union activity (R. I, 93-94, 118-119; II, 44-45), while the warning to Dupree followed shortly after he was told that respondent would close the mill rather than recognize the Union (R. I, 84-85; II, 107-109).

B. RESPONDENT, NOTWITHSTANDING ITS RULE AGAINST PRO-UNION SOLICITATION, ENGAGES THROUGH ITS SUPERVISORS IN ANTI-UNION SOLICITATION DURING WORKING HOURS

Although respondent had promulgated or revived a rule against campaigning for the Union during working hours, its supervisory personnel engaged in anti-union campaigning while the employees were at work, threatening employees with loss of benefits and with a shutdown of the plant if the Union succeeded in organizing it. Thus Supervisor Cabiness told employee Dupree, while the latter was at work in the

spinning room, that respondent "would never recognize the union * * * they would cut those frames up and sell them for junk before they would let the union come in" (R. I, 85; II, 107-108). Cabiness also told employee Price, in the tool room, that if the Union "came to Avondale Mills the mill would shut down" (R. I, 84; II, 98). Foreman Forbus told employee Rich, who was "running the creel job * * * at that time," that "If it goes union, this plant will shut down and we won't have any jobs" (R. I, 81-82; II, 18). In the same vein, Assistant Foreman Brooks told employee McCoy, who was "working at the time," that if the mill became unionized the employees would lose their "old age benefits, the hospital and the profit-sharing would be eliminated of course" (R. I, 87; II, 144).² While employee Connell was at work, Foreman Forbus asked him what he thought he would gain by joining the Union, and said that "the mill would probably shut down if it went union down there" (R. I, 76; II, 83-84). Employee Bass' supervisor asked her, while she was working, what she thought about the Union, and whether all her people belonged to it (R. I, 87; II, 140). As noted above, respondent also sent a personnel clerk to solicit employee Jones' withdrawal from the Union; this

² Foreman Brooks similarly told employee Sned that "you know what you would lose if you were for the union, your hospital insurance and everything" (R. I, 86; II, 138), and he told employee Stephens that advent of the union would probably cause the mill to shut down, and would certainly result in the loss of existing insurance and medical benefits (R. I, 87; II, 76, 78). The record is not clear as to whether these statements were made during working hours.

solicitation likewise occurred while Jones was "on [his] job" (R. I, 93; II, 45).

C. RESPONDENT ENFORCES ITS RULE AGAINST PRO-UNION SOLICITATION BY DISCHARGING THREE EMPLOYEES

1. *John Rich.* On November 10, Foreman Forbus asked employee Rich, while the latter was at work, what he thought about the Union, indicated that he (Forbus) had heard about the union men in town, and then stated that: "If it goes union, this plant will shut down and we won't have any jobs" (R. I, 81-82; 88-89; II, 18). The following day, Rich was called to Foreman Gunter's office where, in the presence of Forbus, Gunter read to Rich the warning against solicitation quoted at pp. 3-4, *supra* (R. I, 89; II, 19-20).

On November 16, Foreman Gunter came to Rich and requested that he stop his distribution of cards outside the mill (R. I, 82, 118; II, 21-22). Rich replied that when outside of the gates he was "on [his] own" and would make no promises (*ibid.*). The next morning, Rich was called to the office of Foreman Forbus and asked to sign a confession that he had violated respondent's no-solicitation "rule" (R. I, 82; II, 22-23). According to respondent, Rich, while riding in the plant elevator, had asked the elevator man if he wanted a union (R. I, 90; III, 38-39). When Rich refused to sign the confession, Forbus said: "John, you are too old a man for this. You're going to be left out in the cold. You'll be left in a ditch. This mill is not going union and you won't have any job" (R. I, 82; II, 23). Rich was laid

off the same night, despite his denials that he had solicited for the Union (R. I, 90; II, 24-26). His employment was thereafter officially terminated after he had followed respondent's complaint procedure in an effort to get his job back (R. I, 90; II, 28-32).

2. *James Jones.* On November 12, Jones, a doffer in the Eva Jane Mill, solicited signatures for union cards among the spinners in the spinning room (R. I, 91; II, 44, 58). The next morning, he was called to the office of Foreman Phurrough. Phurrough, in the presence of Assistant Foreman Cabiness, read the warning against union solicitation after informing Jones he had been reported "working for the Union" (R. I, 91; II, 43). Jones had not previously been aware of any rule prohibiting such conduct (R. I, 121; II, 44).

On the night of November 17, Cleghorn, a personnel clerk and cousin of Jones, told Jones, while the latter was at work, that Foreman Phurrough had requested him (Cleghorn) to ask Jones "to stop working for the Union" (R. I, 121; II, 45, 69). Cleghorn told Jones that mills in a number of cities had shut down because of the Union, that people were going hungry and barefoot, and that "If this mill goes union, we certainly will shut it down as we will not operate under a union contract" (R. I, 94, 121; II, 45). Later, on the same shift, employee Benny Nicholson came to Jones at work and asked for a union card (R. I, 92-93, 121; II, 62-63). Jones replied that he had been warned about passing out cards on the job but that he would get one for Nicholson and give it to him outside the gate, the next morning after work (*ibid.*).

Jones never gave a card to Nicholson, but Nicholson obtained a card from employee Jimmie Dupree, who got it from Jones' car (R. I, 92-93, 121; II, 63-64, 110-111).³ Nicholson turned the card over to Foreman Phurrough the next morning (R. I, 121; II, 171-172).

On November 18, Jones was called to the office of Superintendent Phurrough, who told Jones he had been reported soliciting again (R. I, 82-83, 121; II, 46). Jones denied having solicited anyone (*ibid.*). Phurrough then told Jones he was going to have to lay him off for 30 days, and he handed Jones a paper with his time in full (R. I, 82; II, 47). Jones asked whom he would have to see to prove he had not solicited, and Phurrough told Jones he did not know (R. I, 83, 122; II, 47). Later, the same shift, when Phurrough came to Jones' machine, Jones again asked whom he could see to prove that he had not solicited and Phurrough, after repeating that he did not know, added that Jones could see Halstead, the union organizer (R. I, 83, 122; II, 47-48).

Later, the same morning, Jones returned to the office of Superintendent Callaway to get his pay (R. I, 83, 122; II, 49-50). Callaway asked Jones what the Union had promised him, whether it had shown him a contract, and whether he had heard about other mills shutting down and people going hungry and barefoot. (*ibid.*) Callaway then asked Jones: "Well, why don't you let other people do what they want to do and you do what you want to do, don't go

³ Nicholson had also asked Dupree for a card (R. I, 121, n. 10; II, 110).

around trying to get them to sign the union cards" (*ibid.*). Thereafter, Jones appealed his layoff through respondent's complaint procedure (R. I, 83, 122; II, 51). In the course of this appeal, General Superintendent Turner asked Jones what made him "want to work for the union * * * and he said he just couldn't see what would make a boy come from a good family like I did want to work for such a mess as the Union * * * then he told me that way back yonder some people in Alex City got involved in the same type of business and the families was separated from each other * * * and then he asked me if I was satisfied on the job" (R. I, 83, 122; II, 55). When Jones' complaint reached respondent's president Smith, he likewise asked what made Jones work for the Union and also described the shutting down of other mills (R. I, 84, 122; II, 56). Jones was not reinstated (R. II, 189).

3. Calvin Parker. Parker had been in respondent's employ at various intervals since 1942, until his discharge in November 1954 (R. I, 94; II, 112). Accepting the testimony of respondent's witnesses, the Trial Examiner and the Board found that Parker was discharged for asking an employee if he would sign a union card and for telling him why the Union would be good for the Company; this solicitation took place at a time when Parker had completed his work for the day and the other employee had just begun (R. I, 96-97; II, 155-159; III, 34-36).

II. THE BOARD'S CONCLUSIONS AND ORDER

The Board found that respondent violated Section 8(a) (1) of the Act by interrogating employees concerning their union membership, views, and activities; threatening them with loss of benefits, loss of employment and a plant shutdown, if the Union organized its mills; and soliciting employees to withdraw from the Union (R. I., 100, 116-117). The Board further found that respondent "was prompted to invoke the no-solicitation rule by a desire to prevent unionization of its employees rather than by consideration of plant production and efficiency," noting that "anti-union solicitation was not made an offense," and that respondent's supervisors engaged in coercive and unlawful solicitation during working hours by threatening employees with reprisal for union activities and interrogating them concerning their union membership and sympathies (R. I., 118, 119, 120). Having thus found that respondent's no-solicitation rule was discriminatorily invoked and applied, the Board concluded that the discharges of Jones, Rich, and Parker, allegedly for violating the rule, were violative of Section 8(a) (3) and (1) of the Act (R. I., 120). Finally, the Board concluded that even if the no-solicitation rule had been validly invoked and applied, the evidence with respect to Jones established that he was unlawfully discharged because of his adherence to the Union, and not because of his alleged violation of the rule (R. I., 121-123).

- The Board accordingly ordered respondent to cease and desist from violating Sections 8 (a) (1) and (3), to reinstate the three dischargees with back pay, and to post appropriate notices (R. I, 125-130).

III. THE DECISION OF THE COURT BELOW

Noting that respondent did not challenge the Board's findings with respect to the coercive conduct of respondent's supervisors, the court below enforced the Board's order insofar as it rested upon respondent's unlawful threats and interrogation of employees (R. I, 133). The court likewise agreed with the Board that respondent had unlawfully discharged Jones for union activity, and enforced the order insofar as it directed his reinstatement with back pay (R. I, 134). But, notwithstanding the coercive and unlawful anti-union solicitation by the supervisors during working hours, the court below held that violation of the no-solicitation rule by employees furnished the Company a valid ground for their discharge (R. I, 133-134). The court conceded that an "otherwise valid no-solicitation rule [i. e., one which prohibits union solicitation during working hours] cannot be invoked or applied for a discriminatory anti-union purpose" (R. I, 133-134). It concluded, however, that "The evidence fails to establish that any solicitation in violation of the rule had ever been permitted. Nor does the facts alone that the company was opposed to the union, as was its lawful right, furnish substantial evidence of an unlawful and discriminatory purpose in invoking and applying its no-solicitation rule" (R. I, 134). The court accordingly set

aside the Board's order insofar as it directed respondent to reinstate Rich and Parker with back pay and to cease discriminatorily enforcing the no-solicitation rule (R. I., 135).

ARGUMENT

This case is to be argued directly following *National Labor Relations Board v. United Steelworkers of America, CIO, and Nutone, Inc.*, No. 81, this Term. In that case, the Court of Appeals for the District of Columbia Circuit held, contrary to the Board, that an employer who distributed *lawful, non-coercive* anti-union literature during working hours could not lawfully prohibit employees from disseminating pro-union literature under the same conditions. That court reasoned that the employer's actions vitiated the justification for an otherwise valid no-distribution rule. Should this Court sustain the District of Columbia Circuit in that case, this case must be reversed *a fortiori*, for here the Company accompanied its no-solicitation rule by engaging, through its foremen, in *unlawful, coercive* anti-union solicitation. We shall therefore assume, for purposes of this brief, that the Court will reject the view of the District of Columbia Circuit and will hold, in accord with the views advanced by the Board in No. 81, that the employer in that case was privileged to forbid the dissemination of union literature during working hours. On that assumption, we nonetheless believe that the decision in this case should be reversed, as the conduct of the employer here establishes discriminatory motivation in the invocation and application of the no-solicitation rule.

THE DECISION MADE BY THE BOARD IN THE INSTANT CASE IS A PROPER APPLICATION OF THE PRINCIPLES GOVERNING EMPLOYEE SOLICITATION DURING WORKING HOURS. THE CONTRARY RULING OF THE COURT BELOW SHOULD BE REVERSED.

As is developed more fully in the Board's brief in No. 81, pp. 16-24,¹ the right guaranteed employees by Section 7 of the Act to engage in union solicitation occasionally conflicts with the competing right of employers to unimpeded production during working hours. As this Court has recognized, when these rights conflict, a balance must be struck giving as much scope as possible to both the competing interests; and it is the Board's duty, subject to court review, to evolve the principles, consistent with the statute, by which this balance will be struck. *Republic Aviation Corp. v. National Labor Relations Board*, 324 U. S. 793, 797-798; *National Labor Relations Board v. Babcock & Wilcox Co.*, 351 U. S. 105, 111-113; *National Labor Relations Board v. Stowe Spinning Co.*, 336 U. S. 226, 231.

The Board expressed the principles which guide it in *Peyton Packing Co., Inc.*, 49 N. L. R. B. 828, 843-844, cited with approval in the *Republic* case, 324 U. S. at 803-804. With respect to "no-solicitation" rules, the Board there stated (49 N. L. R. B. at 843, quoted at 324 U. S. 803, n. 10):

Working time is for work. It is therefore within the province of an employer to promulgate and enforce a rule prohibiting union solicitation during working hours. Such a rule must be presumed to be valid *in the absence*

¹Copies of that brief have been served upon respondent.

of evidence that it was adopted for a discriminatory purpose. [Emphasis supplied.]

In short, the Board making an adjustment between the competing interests and rights, permits an employer to limit the Section 7 right of the employees to engage in solicitation where the abridgement is not for the purpose of interfering with union activities (although it necessarily has that incidental effect), but is solely for the purpose of assuring the employer of the employees' full attention to work during working hours. Where, however, the employer's prohibition of union solicitation during working hours springs not from a concern over undisturbed production, but from a desire to discriminate against and thwart union activity, the no-solicitation rule loses its protected character as a legitimate means of furthering production and becomes an unwarranted invasion of the employees' statutory rights.

This analysis, first enunciated in the *Peyton* case, has met with uniform judicial approval. This Court has indicated that where the invocation of restrictive rules flows not from the employer's right to protect legitimate interests; but from his desire to obstruct employee self-organization, the immunity otherwise accorded him is forfeited. *National Labor Relations Board v. Stowe Spinning Co.*, 336 U. S. 226, 230, 233; see, also, *National Labor Relations Board v. Babcock & Wilcox Co.*, 351 U. S. 105, 111, n. 4. The courts of appeals have likewise held that where a rule against solicitation, even though reasonable on its face, is invoked out of a desire to impede self-organization rather than for legitimate business reasons, the rule

is invalid and discharges for its violation are unlawful. *National Labor Relations Board v. Denver Tent & Awning Co.*, 138 F. 2d 410 (C. A. 10); *Carter Carburetor Corp v. National Labor Relations Board*, 140 F. 2d 714, 716-717 (C. A. 8); *National Labor Relations Board v. William Davies Co.*, 135 F. 2d 179, 181 (C. A. 7), certiorari denied, 320 U. S. 770. Finally, in *Babcock & Wilcox*, this Court summarized the law by stating that the right of employees to discuss self-organization on plant premises is not to be restricted save where the employer affirmatively establishes that the restriction is necessary to protect legitimate business interests. 351 U. S. at 113.

The Board, applying these principles in the instant case, concluded that respondent "was prompted to invoke the no-solicitation rule by a desire to prevent unionization of its employees rather than by consideration of plant production and efficiency" (R. I., 119).⁵ The record manifestly supports this finding. Respondent invoked the rule at the outset of the union campaign, warned only pro-union employees against solicitation, and accompanied the warnings with threats to close the mill if the Union were successful. This alone would indicate that the employer's reason for prohibiting solicitation was not a concern for plant efficiency but hostility to the Union's attempt to organize.

⁵ The trial examiner's contrary finding (R. I., 99) rests not on any question of credibility but solely on his conclusions from the testimony in the record. Under these circumstances the Board's findings, if supported by the record, should be sustained. *Federal Communications Comm. v. Allentown Broadcasting Corp.*, 349 U. S. 358, 364.

Conclusive evidence that the no-solicitation rule was discriminatorily invoked to impede union organization is found in respondent's own resort to coercive anti-union solicitation during working hours. As described above, pp. 5-7, respondent's supervisors repeatedly interrupted employees at their work to discuss the Union's efforts to organize, and solicited employees to abandon the Union by threatening them with loss of benefits if they did not. If the employer's concern in promulgating a no-solicitation rule was the valid one that working time is for work, he would not utilize the same working time to engage in coercive anti-union solicitation. The impact on production of respondent's coercive anti-union solicitation (pp. 5-7, *supra*) was at least as great as the impact of the alleged solicitations by Jones, Rich, and Parker (pp. 7, 8, 10, *supra*). When an employer with a no-solicitation rule engages in such coercive solicitation during working hours, he demonstrates that his real objective in invoking the rule is not the lawful one of promoting production, but the unlawful one of impeding union organization. The no-solicitation rule discriminatorily enforced by this employer does not achieve a balance between two legitimate competing interests, but, instead, infringes on the employees' statutory rights solely for the purpose of accomplishing the infringement.⁸

* Unlike *NuTone*, No. 81, there can be no question here as to the impact of Section 8 (c), for that Section is in terms limited to the situation where the employer's expression of views "contains no threat of reprisal or force or promise of benefit."

Having established that respondent's no-solicitation rule was discriminatorily invoked, and was intended not to safeguard production but to thwart the exercise of Section 7 rights, the Board properly held the rule invalid. It follows that employees who were engaging in pro-union solicitation were engaging in an activity protected by Section 7 and not forbidden by any valid rule. *Babcock & Wilcox*, 351 U. S. at 112; *Republic Aviation*, 324 U. S. at 797-798. Their discharge for such activity was therefore violative of the Act. *Republic Aviation*, 324 U. S. at 805; *Denver Tent & Awning*, 138 F. 2d at 411; *Carter Carburetor*, 140 F. 2d at 717; see, also, *National Labor Relations Board v. Peyton Packing Co.*, 142 F. 2d 1909, 1919 (C. A. 5).

The courts below conceded that an "otherwise valid no-solicitation rule * * * cannot be invoked or applied for a discriminatory purpose." It concluded, however, that since the evidence failed to establish that "any solicitation in violation of the rule had ever been permitted," the record lacked "substantial evidence of an unlawful and discriminatory purpose in invoking and applying [the] no-solicitation rule" (R. I., 133, 134). If the court's factual premise had any support in the record, then the differences between the Board and the court would involve no more than a mere disagreement between the two tribunals in their appraisal of conflicting evidence. But "the facts are to the contrary * * *." *National Labor Relations Board v. Warren Co.*, 350 U. S. 107, 110. As the court below itself recognized, respondent violated Section 8(a) (1) of the Act by the coercive anti-union conduct of its supervisors. Much of this

unlawful anti-union conduct occurred during working hours when respondent's rules prohibited pro-union solicitation. What the court below failed to recognize is that when an employer "appeals" to employees to abandon their union, threatening them with loss of benefits if they do not, he is engaging in "anti-union solicitation," just as a union protagonist urging employees to join, and suggesting benefits if they do, is engaging in pro-union solicitation.

CONCLUSION

For the reasons stated, the judgment of the court below should be reversed and the case remanded with directions to enter a decree enforcing the order of the Board.

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IN THE
SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1957.

NATIONAL LABOR RELATIONS BOARD

v.

AVONDALE MILLS.

On Writ of Certiorari to the United States Court
of Appeals for the Fifth Circuit.

BRIEF FOR AVONDALE MILLS.

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No. 289.

IN THE
SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1957.

NATIONAL LABOR RELATIONS BOARD
v.
AVONDALE MILLS.

On Writ of Certiorari to the United States Court
of Appeals for the Fifth Circuit.

BRIEF FOR AVONDALE MILLS.

STATEMENT OF THE CASE.

In order that the instant matter be viewed in proper perspective, Respondent deems it necessary to briefly review the salient facts relating to the issue here.

As found by the Court below, Respondent operates nine textile mills in seven communities in Alabama. It employs approximately six thousand people. Its principal offices and two of its principal plants are located in Sylacauga (the two here involved, Eva Jane Mill and Catherine

Mill), three other large plants are located at Sycamore, Pell City, and Alexander City, Alabama, all within a radius of forty miles of Respondent's Sylacauga operations (R. I, 74).

The evidence moreover shows that beginning in October, 1954, the charging Union in the instant matter began to make what it characterized as "surveys" in and around Respondent's Sylacauga, Pell City, and Alexander City plants and in the course of its surveys contacted a number of Respondent's employees (R. II, 13). The evidence shows, moreover, that sometime early in November, 1954, the Union organizers gave to some sixty of the employees in Respondent's Sylacauga Mills, from ten to sixty union membership cards each, for the purpose of having these cards signed in connection with the Union's organizing campaign (R. II, 11-13). The evidence shows, and the Trial Examiner found, as did the Court below, that immediately thereafter a number of employees began to engage in widespread solicitation of Union memberships in Respondent's Mills during work time. This was observed by Supervisors. There were complaints to the Supervisors from employees about this, and complaints from Supervisors in one Department to Supervisors in other Departments about their employees leaving the Departments in which they worked and going into other Departments during working hours to solicit other employees at work, on behalf of the Union (R. I, 71, R. II, 77, 86, 157, R. III, 4-6, 9, 10, 16, 22, 23, 25, 26, 48).

The evidence shows that Respondent does not prohibit general discussions of any matter by employees in its plant during non-work time, i. e., not only on its premises, but also during periods when employees are in the smoking areas, rest rooms, eating lunch, etc. (R. II, 152). The evidence shows, moreover, that Respondent has had, for a number of years, a rule prohibiting any solicitation within

its plants during actual work time for any purpose, or cause, other than the annual Red Cross Charity solicitation, and that from time to time this rule has been called to the attention of employees (R. II, 152).

Moreover, the evidence shows that it has been Respondent's consistent practice in the sixty years of its existence not to have written rules (R. I, 72). Respondent has never published its rules, practices, and instructions by posting notices on its bulletin boards, issuing detailed written instructions, or any like device, but rather, it has distributed in writing only the general policy statement on rules contained in the booklet entitled "An Introduction to Avondale" (G. C. Ex. 2, R. III, 55) to wit:

"2. Compliance with Rules. It is necessary to have plant rules regarding conduct, safety and housekeeping. These rules are designed for the protection and well being of all.

"3. Maximum Efficiency. High production and quality enable Avondale to compete successfully with other mills in the industry and are the sources of profits to be shared . . .

"5. Personal Interest in Avondale. Your interest, both in your own job and in the over-all program of the Company, is necessary for the maximum success of the partnership program . . ."

Beyond this, all rules and policies affecting employees are conveyed by oral communication from supervision to employees. Many rules, policies, and practices have not been reduced to specific terms but have existed as a matter of custom and practice, and they have become accepted by traditional knowledge that there is a certain type of conduct which is expected of employees and certain other conduct which is prohibited. Among its other practices, Respondent follows a practice of not disciplining any em-

ployee for violation of rules, directions, or policies, until the rule, direction, or policy has been expressly called to the attention of the employee and he has been advised that future violations will result in discharge or discipline.

The Trial Examiner, based on the evidence, found, moreover, that prior to the widespread in-plant solicitation for union membership, at least one employee (a Board witness) had been expressly warned about solicitation in Respondent's plant during working hours, as a result of his circulating a petition seeking a pardon for his son who was then in the penitentiary (R. II, 81, 82). This employee testified that his Supervisor told him: "You know the Company won't allow you soliciting on the job" (R. II, 82). This same employee (G. C. Cook) was later reprimanded for engaging in union solicitation on the job. He nevertheless testified that he had no knowledge of any rule against solicitation while at work (R. II, 80, 81).

The evidence shows, moreover, that the employees produced as witnesses for the General Counsel of the Board, and who testified about being warned against future violations of the rule against in-plant solicitation during work time were not "singled out" for warning, except as a result of actual observation, or of a particular report or complaint by some other employee, or by some Supervisor, that they were interfering with others while on the job, or neglecting their own jobs as a result of their solicitation during work time (R. III, 8, 22, R. II, 77, 85, 32, 135, 160). A number of them testified that as of the time they were warned against future solicitation while at work, they were not aware of Respondent's rule against such solicitation. Others, on the other hand, testified that they knew that soliciting on the job was against the plant rules; and as stated above, at least one of the Board's witnesses testified to a previous warning for solicitation on the job in connection with a matter not remotely connected with union activities.

The Trial Examiner found:

" . . . Respondent contends that the basis of its warning was a recognized rule in industry generally, and in Avondale certainly as a plant rule, that 'working time is for work', and that no solicitation of any kind was countenanced without disciplinary action after warning; and that this restatement of its existing rule was necessary when it became apparent that there was extensive union solicitation being carried on which was interfering with production and efficiency and was causing complaints by employees who were being interfered with at their jobs. On the basis of the entire record, the Trial Examiner finds that there was a valid but unwritten rule against solicitation of any kind on working time—excepting only the annual 'Red Cross' charity drive, and that the warning was predicated thereon.

"Therefore, unless inherently bad solely because the warning was limited to union solicitation, and if not discriminatorily applied and used as a pretext, the rule was sound. Cf. Peyton Packing Co., *supra*. Also to argue that the rule was invalid because not formulated and enforced until the union adherents began soliciting is a philosophic non sequitor—otherwise, the occasion would never have arisen. The testimonies of plant Superintendents Callaway and Pasley, together with those of Foremen Gunter, Pickren and Forbus indicate that the solicitation activity was interfering with production and plant efficiency. Therefore, it cannot be held that it was adopted and enforced without any regard to business necessity for the purpose of impeding employees' self-organizational efforts by interfering, restraining, and coercing them when employees were leaving their jobs to solicit union membership of working employees. This is precisely what happened. Again, the test is whether a presumptively

valid rule was discriminatorily applied, and the burden of proof was on the General Counsel to prove otherwise. He did not sustain that burden . . ." (R. I, 98, 99).

The evidence moreover establishes that after the warning and notification by the Respondent of its rule against solicitation during working hours by employees supposed to be at work, or of employees supposed to be at work, that three of the employees, who had been warned, thereafter again violated the rule by engaging in solicitation during their working hours or by soliciting other employees who were at work. Two of these cases are here before this Court in the present status of this matter.

One involves John Rich, who, after having been expressly warned against future solicitation while on the job and after being instructed that he must stay on the job during the time he was supposed to be at work, nevertheless during the same week in which he received the warning, left his own Department at a time when he was supposed to be at work and solicited another employee who was at work in another Department on his job, to sign a Union card and to join him in soliciting others in his Department to sign membership cards (R. III, 18). This was reported to the Supervisor of the employee being solicited by Rich, who in turn reported it to Rich's own Supervisor. When Rich was called in by his own Supervisor, he admitted having engaged in such solicitation during work hours and after his previous warning (R. III, 3; 4, 18, 19). He was suspended and ultimately discharged for violating the rule. There was no dispute of fact whatsoever as to Rich's violation of the rule after warning. The Trial Examiner found, as Rich's own testimony required, that Rich was aware of the rule and that he actually violated it after being expressly warned that he must obey the rule in the future or he would be discharged, and that Rich admitted these facts. The Board made no different or con-

trary finding of fact as to the circumstances of Rich's discharge.

As to Calvin Parker, the evidence shows that Parker had solicited one employee several times during the night of November 12 in an effort to get him to sign a Union card; that in order to perform this solicitation Parker had to leave his job while he was supposed to be at work on it, and while his job in fact required his presence in order to keep his machine running, and go some distance from his own place of work to the place of work of the employee, Craddock, who was also at work, in order to solicit him to join the Union. This solicitation of Craddock by Parker continued throughout the entire shift. Ultimately, Craddock testified, he signed a card in order that Parker would let him alone and permit him to continue to do his job (R. III, 21). When Craddock next saw his Foreman he reported to him the facts as to Parker's solicitation of him while on his job, and while Parker was also supposed to be at work (R. III, 21, 34). When Parker reported for work at the beginning of his next shift, he was called in and given a specific warning that future solicitation on Company time—that is, during his own working hours or those of persons who were at work, would result in his discharge (RA 384, 403). Thereafter, during the same evening and later in the same shift, Parker not only ignored this warning, but deliberately and flagrantly violated the no-solicitation rule again, by soliciting another employee to join the Union during Parker's own working hours before the other employee had begun work and again soliciting him to join the Union or to sign a Union membership card after this employee began his work. This was reported to the Supervisor by the employee solicited (R. II, 158). As a result of this report, Parker was sent for by his Supervisor, suspended, and ultimately discharged. While Parker denied the above in part, the evidence shows that Parker, in the course of his effort to have his sus-

pension or discharge rescinded, admitted at least on one occasion that he had in fact solicited in violation of the rule after the previous warning (R. III, 32). The Trial Examiner found:

“ . . . In view of the corroboration of Pickren's testimony and the equivocal and diffusive testimony of Parker himself, the conflict is resolved in favor of Pickren's version. Accordingly, the Trial Examiner finds that Parker solicited union memberships of employees on the job after having been warned that such solicitation was in violation of a company rule; and his resultant discharge was not in violation of the Act as being discriminatory. Accordingly, it will be recommended to the Board that the allegation be dismissed . . . (R. I, 97).

The General Counsel for the Board in its Exceptions to the Intermediate Report of the Trial Examiner did not except to the Trial Examiner's credibility findings as to Parker. The Board in its Order made no finding of facts as to the circumstances of Parker's discharge contrary to those of the Trial Examiner.

The third employee who was discharged for violation of the rule was an employee named James Melvin Jones. There was a dispute of fact in the evidence as to whether or not Jones, who had been warned against future solicitation in the plant and while on the job did, thereafter, again violate the rule. The Trial Examiner found that the suspension and discharge of Jones was as a result of his solicitation of other employees during working hours after having been warned against such activity in violation of the rule in the future under penalty of discharge.

The Board in its Decision and Order made specific contrary findings of fact to those of the Trial Examiner as to Jones' conduct after the warning. It reversed the Trial Examiner's factual findings as to Jones and held that

Jones' discharge was discriminatory even though the rule might be valid:

" . . . We are convinced by the foregoing evidence, more particularly, the Respondent's efforts to persuade Jones to cease his union activities, the summary nature of his layoff and discharge without giving him an opportunity to prove that he did not violate the rule, the fact that he did not engage in the prohibited solicitation, the statements made to Jones by ranking company officials, the Respondent's hostility to the Union as well as its other unfair labor practices, that it was Jones' adherence to the Union rather than his asserted disregard of a prior warning that motivated the Respondent in laying off and then discharging Jones. Accordingly, we find, contrary to the Trial Examiner, that, apart from the question of the validity of the no-solicitation rule, the Respondent discriminated against Jones in violation of Section 8 (a) (3) and (1) of the act . . ." (R. I, 123).

The Trial Examiner, based on the evidence before him, also found there were certain violations of Section 8 (a) (1) committed by certain of the Supervisors of Respondent subsequent to the invocation of the no-solicitation rule. These violations were in the nature of interrogation and several comments or remarks made by Supervisors which the Trial Examiner found to be coercive or threatening and therefore violative of the Act; and one instance in which a Supervisor during non-work time asked an employee if he wished to withdraw his union application. The Trial Examiner's findings and recommendations in connection with these instances were not excepted to by the Respondent. The Board affirmed them. When the matter was brought before the Court below for enforcement, the Respondent did not there resist enforcement of the Board's Order in these particulars. Respondent limited its re-

sistence to the enforcement by the Court below of that part of the Board's Order which directed the reinstatement of Rich, Parker, and Jones.

The Court, in its Opinion, found that substantial evidence in the Record as a whole did not support the Board's finding that the Company's no-solicitation rule was invoked for discriminatory reasons, and that it was not discriminatorily applied to Rich and Parker, holding:

" . . . On the first issue, then, we agree with the Trial Examiner and find there was no substantial evidence to support the Board" (R. I, 134).

On the second issue, the discharge of Jones, the Court held:

"On the second issue, whether employee Jones was nevertheless discriminatorily discharged, we think that the Board's findings, though contrary to those of the Examiner, are supported by substantial evidence in the Record as a whole and hence should be sustained by us . . ." (R. I, 134).

A Petition for Reconsideration as to the first issue was filed with the Court below. That Petition was denied by the Court (R. I, 137-139).

SUMMARY OF ARGUMENT.

A. The Issue Here Is a Purely Factual Issue Growing Out of the Board's Disagreement With the Evaluation of and the Weight Given the Evidence in the Record When Considered as a Whole by the Court Below. The Act Charges Courts of Appeal With the Responsibility for Granting or Denying Enforcement of Labor Board Orders. This Court Has Said It Will Not Reverse a Court of Appeals in Such Matter Because It May Differ With the Court of Appeals' Appraisal of the Evidence.

The Board seeks in this Petition for Certiorari to have this Court review and reappraise the weight and sufficiency of the evidence in the Record and to decide a conflict between the Court below and the Board, not a conflict between the Circuit Courts of Appeal. The issues involved herein do not present any conflict of principles of law. The Board, the Court below, and the Respondent all rely upon the principles enunciated in **Peyton Packing Company**, 49 NLRB 828, aff. 142 F. 2d 1009, 5th Cir. All recognize that Respondent had a legal right to invoke and enforce a rule against solicitation on its premises during the working time of its employees so long as the rule was not invoked or applied discriminatorily.

While the question upon which certiorari was sought is phrased in such a manner that upon first impression it seems to present an issue of law, an examination of the Record and a reading of the Board's Brief clearly show that the Petitioner complains of the Circuit Court's appraisal of the evidence and not of that Court's interpretation of any legal principle under the Act. The issues in this Petition for Certiorari are purely factual issues which were decided adversely to the Petitioner in the Court

below after that Court's consideration of the evidence in the Record as a whole.

The entire argument of Petitioner as contended in its Brief rests upon a recitation of evidentiary matters which it contends should have required the Court below to conclude, as a matter of fact, that Respondent's no-discriminatory rule was discriminatorily invoked and applied and that the two employees involved in the Petition for Certiorari were discriminatorily discharged. On these issues both the Trial Examiner and the Court below found, as a matter of fact and contrary to the Board, that Respondent's no-solicitation rule was neither discriminatorily invoked nor applied as to the two employees involved herein. The issues which were presented to the Court below were issues involving the substantiality of the evidence in the Record which supported the Board's Order. The issue as framed and decided by the Court below was whether or not there was substantial evidence in the Record as a whole which would support the Board's Order that Respondent's no-solicitation rule was discriminatorily invoked or applied. The same issue is here presented by Petitioner in the hope that this Court will reappraise the evidence in the Record, and reach conclusions as to weight and sufficiency of evidence different from those reached by the Court of Appeals.

This Court has said it will not interfere with decisions of the Courts of Appeal involving enforcement of Labor Board orders solely for the purpose of reviewing a conflict of evidence or substituting its judgment as to the weight or substantiality of the evidence.

"... Congress has charged the Courts of Appeal, and not this Court, with the normal and primary responsibility for granting or denying enforcement of Labor Board orders... This is not the place to review a conflict of evidence nor reverse the Court of Appeals

because were we in its place we would find the record tilting one way rather than the other, though fair minded Judges could find it tilting either way. . . .”

(**NLRB v. Pittsburgh Steamship Co.**, 340 U. S. 498, 502, 503, 95 L. ed. 479, 482, 483.)

The Petitioner has attempted to pose a legal issue to this Court and what it contends to be a conflict of law as between the circuits by adroit phraseology of a unique interpretation concerning coercive remarks which were made by several of Respondent's supervisors. What Petitioner overlooks is the fact that the coercive remarks which were made by a few of Respondent's supervisors on the several occasions as shown by the evidence do not in themselves present any unique legal issue amounting to a conflict between the circuits, but that they constitute no more than evidence to be considered along with other evidence in the record in determining the factual issue of whether or not Respondent discriminatorily invoked or applied its no-solicitation rule. Such remarks, even though violative of Section 8 (a) (1) of the Act do not automatically render invalid Respondent's otherwise valid no-solicitation rule. This same factual issue was presented to the Court below in Petitioner's Motion for Rehearing in that Court. In the Court's judgment, based upon its appraisal of the record as a whole, including the coercive remarks by supervisors, that part of the Board's Order here involved was not supported by substantial evidence in the record as a whole.

The Petitioner's argument clearly illustrates that Petitioner has departed from the question posed in its Petition for Certiorari and, instead, urges this Court to review the sufficiency of the evidence in the record and to decide, contrary to both the Trial Examiner and the Court below, that the Board's Order was supported by substantial evidence contained in the record as a whole. Petitioner hopes

that this Court will find, in its judgment, "the record tilting" in its favor and on that basis reverse the Court of Appeals' decision. This the Court, both by Congressional mandate and its own decisions, should not and will not do. Labor Management Relations Act, 1947, 10 (e), 61 Stat. 148, 29 U. S. C. (Supp. III), Sec. 160 (e), **NLRB v. Pittsburgh Steamship Co.**, supra.

B. **The Full Measure of Self-Organizational Rights of Respondent's Employees Which the Act Grants Has Not Been Impaired. The Accommodation of These Rights Should Not Be Elevated to Such a Paramount Position as to Deprive Respondent of its Equally Important Rights. The Discharges of Rich and Parker for Violation of Respondent's Rule and Directions After Being Warned Against Future Violations Were Discharges "for Cause" Within the Meaning of Section 10 (c) of the Act. The Board May Not Direct Reinstatement and Back Pay as to Employees So Discharged.**

The right of employees to engage in Union solicitation on plant property is not so unlimited as to ignore the countervailing right of an employer to the use, productivity, and enjoyment of his property. The rights of both employees and employers in this regard must be balanced so that "accommodation between the two (is) obtained with as little destruction of the one as is consistent with the maintenance of the other . . ." (**NLRB v. Babcock and Wilcox Company**, 351 U. S. 405). As this Court pointed out in **NLRB v. LeTourneau Company of Georgia**, 324 U. S. 793, 797-798, there must be "an adjustment between the undisputed right of self-organization assured to employees under the . . . Act and the equally undisputed right of employers to maintain discipline in their establishments. The rights of each should be accommodated as fully as possible without more than 'minimum impairment' to the other."

In this case, the full self-organizational rights, to which both the Board and the Courts have historically held that employees are entitled, have been maintained without impairment. Respondent has demanded that its employees' work time be devoted to work! It has **done** nothing more. Respondent has not prohibited its employees from engaging in any Union activities on its property during such times as its employees are not supposed to be working. Respondent's employees are free to engage in Union solicitation or other Union activities while on Respondent's property during such time as they are in smoking areas, rest rooms, or lunch periods, and in the pre- and post-shift times. Congress did not intend that employers' right to expect and require their employees to spend working time at work be subordinated to what the Board apparently contends is a right of employees to engage in Union solicitation or other self-organizational activities during actual work time (Report of the Committee of Conference on Labor-Management Relations Act of 1947).

The Board urges that because several of Respondent's supervisors engaged in what the Board found to be coercive, anti-union actions in violation of Section 8 (a) (1) of the Act, Respondent has therefore forfeited its right to expect and demand that its employees' working time be devoted to work and that they not leave their jobs during such time to engage in extraneous activity. The Board urges that Respondent be penalized in this manner even though the self-organizational rights of Respondent's employees are more than amply preserved by their right of having full opportunity to engage in union solicitation or other self-organizational activities off company property and on company property at all times except when they are supposed to be working. The fact that they may not utilize their actual work time to exercise these rights is merely a minimum accommodation of their rights to the equally important rights of their employer.

What the Board seeks to do is to make paramount the rights of employees under Section 7 of the Act in complete disregard to, and derogation of, Respondent's right to the use, control, and enjoyment of its property. Such a deprivation of property rights was not intended by Congress and the Board cannot limit the rights of Respondent to whatever extent it in its discretion dictates.

The two employees involved herein, as well as other employees, were warned that they would be subject to discipline or discharge if in the future they left their jobs to engage in solicitation or solicited other employees while they were working. In spite of the warnings the two employees, in complete disregard of Respondent's right to expect them to remain on their jobs, and its specific instructions, thereafter engaged in solicitation during times when they were supposed to be at work. They were suspended and discharged because of their flagrant disregard of Respondent's instructions and warning. Respondent certainly had a right to discharge them for violating its rule against solicitation. "The employer in his control over the property and employees is authorized to make reasonable rules for the conduct of the business and the employee is bound to obey such reasonable rules as part of his contract of hire." (**Midland Steel v. NLRB**, 113 F. 2d 805, 6th Cir.)

And as this Court pointed out in **NLRB v. Jones & Laughlin Steel Co.**, 301 U. S. 1, 45-46, . . . L. ed. 893, 916-17, the Act "does not interfere with the normal right of an employer to discharge its employees" and "the Board may not make its authority a pretext for interference without right unless the right of discharge is exercised discriminatorily." This Court has moreover held that within the meaning of Section 10 (e) of the Act as amended, which prohibits the Board's ordering reinstatement or back pay for employees discharged "for cause," that ". . . insubordination . . . is adequate cause for discharge

" (NLRB v. Local Union 1229, IBEW, 346 U. S. 464, 474-5, 98 L. ed. 195, 203.)

In this case Respondent had a valid rule prohibiting solicitation by its employees on its property during times when the employees were supposed to be working. The evidence overwhelmingly shows that the two employees involved herein violated the rule after being previously warned against future violations thereof and were discharged therefor. Respondent had a right to expect them to follow its rules and to discharge them for violation. Such a right of Respondent with respect to its property and its work time is inherent and should not be invaded and denied when its employees had not been deprived of the accommodation of their self-organizational rights which the Act requires.

In the light of the discharge of Rich and Parker for cause, the Decision of the Court below as to them should be sustained independently of any action taken by this Court in connection with the Nutone case.

C. **The Act Prescribes and the Court Below Has Decreed the Traditional Specific Remedies for the Correction of the Unfair Labor Practices Found to Have Been Committed by Respondent. In Addition to These Adequate Remedies, the Board Seeks to Impose Additional Requirements Upon Respondent Which Are Punitive in Nature and Not Remedial and Which Result in a Forfeiture of Inherent Rights of Respondent. Such Punitive Remedies Are Beyond the Scope, Power and Authority Vested in the Board by the Act.**

For the violations of Section 8 (a) (1) of the Act committed by Respondent's Supervisors, the Board and the Court below have provided a complete, adequate and specific remedy. Respondent has been ordered and required to cease and desist from such activities under the penalty

of contempt for such future conduct. This is the remedy which was envisioned by Congress and has traditionally been followed by the Board under the Act and universally upheld by the Courts. The Act does not authorize the Board to apply or prescribe any penalty which it, in its discretion, believes might effectuate the policies of the Act. The powers of the Board, by law, are remedial, not punitive. **Consolidated Edison v. NLRB**, 305 U. S. 197, 235, 236, 83 L. ed. 126, 143, 144.

The Board may not apply a remedy which deprives an employer of his normal right to control the working time of employees while they are on their jobs, or deprives him of it simply because the employer's supervisory employees discuss unions or make anti-union remarks on its premises during the non-supervisory employees' working time.

The Board overlooks the vast and inherent difference between the nature of the duties and functions of supervisory and non-supervisory employees. The jobs of Respondent's Supervisors require them to move about in the plant, during work time, to make themselves aware of conditions of their subordinate employees' jobs while they are running; to instruct these employees; to communicate orders, directions and information to them; and discuss theirs and the Company's production problems and other policies with them. On the other hand, it is the primary duty of non-supervisory employees to stay on their jobs and run them when they are supposed to be running. They are not to leave their jobs during the time they are required to run them to utilize such time to engage in extraneous activities.

If, during the course of carrying out his duties and functions, which are different from those of a non-supervisory employee, a supervisory employee expresses views or makes remarks found to be violative of the Act, such conduct does not thereby enlarge the scope of the Act or the powers of the Board so as to enable the Board to require and direct

an employer to permit its non-supervisory employees thereafter to desert their jobs at will and engage in solicitation or other activities if and when they deem it desirable. If a Supervisor exceeds the permissible limitations of the Act, or as a result of his comments, conversations or actions violated the Act, there is a specific remedy to rectify such violations of the Act. This does not, however, as a consequence, so expand the Act as to extend the scope of the employee rights beyond the point of balance required between the rights of self-organization and the employer's property rights.

Respondent may not be required, as the Board seeks to do here, to make its premises and work time available to the union for its use as a penalty for its having committed an unfair labor practice under the Act, or as a penalty for Supervisors' comments which have gone beyond the point which an employer may go in the exercise of its protected right of free speech. **NLRB v. Stowe Spinning Co.**, 336 U. S. 226, 98 L. ed. 638, 646.

ARGUMENT.

A. The Issue Here Is a Purely Factual Issue Growing Out of the Board's Disagreement With the Evaluation of and the Weight Given the Evidence in the Record When Considered as a Whole by the Court Below. The Act Charges Courts of Appeal With the Responsibility for Granting or Denying Enforcement of Labor Board Orders. This Court Has Said It Will Not Reverse a Court of Appeals in Such Matter Because It May Differ With the Court of Appeals' Appraisal of the Evidence.

The issue involved in the Petition for Certiorari and in the instant matter is not, we submit, an issue of law, but is an issue of fact which grows out of the Board's seeking to have this Court agree with its evaluation of the evidence in lieu of that made by the Court below as a result of its examination of the evidence in the Record considered as a whole. The issue here involved has consistently been an issue of fact; it was an issue of fact insofar as the Petition for Enforcement in the Court of Appeals was concerned; it was an issue of fact insofar as the Petition for Rehearing by the Court of Appeals was concerned; and it continues to be an issue of fact as it is stated and argued in the Brief of the Petitioner in this Court.

Respondent submits that while the question as posed in the Petition for Certiorari gives the appearance of raising a purely legal issue, that is merely as a result of adroit phraseology and does not in fact present the true issue here. This is clearly established by the actual argument and detailed contentions in Petitioner's Brief to this Court in the instant matter, which clearly establish that the Petitioner here is in fact asking this Court to review and reverse the factual determinations made, and the weight given certain evidence by the Court of Appeals below on the basis of its examination of the entire Record, because

that Court's determination as to the evidence differs in this regard from the conclusions reached by the Board in its reversal of the Trial Examiner's Findings and Recommendations.

The Respondent, the Petitioner, the Trial Examiner, and the Court below all rely upon the holdings and principles enunciated in the **Peyton Packing** case, 49 NLRB 828, Aff. 142 F. 2d 1009, 5th Cir., and the application of those principles to the facts here. Each ultimately concedes that Respondent has a legal right to invoke and enforce a rule against solicitation on its premises during the working time of its production employees in order to protect its property, its production, its discipline, or to meet its business needs. All concede that the rule invoked by the Respondent here was limited to solicitation by employees during the period when they were supposed to be at work and that the rule did not interfere with solicitation during the free time of employees during their working hours or with solicitation by them on Respondent's premises during non-working hours. Such a rule is in keeping with normal and almost universally accepted industrial practice. Rules imposing even greater limitations on employees' work time solicitation than Respondent's rule have been consistently upheld by the Courts as being properly within management's right to control its property, protect its production, efficiency, or discipline.¹

¹ *Republic Aviation v. NLRB*, 324 U. S. 793, 803; *NLRB v. LeTourneau*, 324 U. S. 793; *NLRB v. Babcock & Wilcox*, 351 U. S. 105, 114; *Boeing Airplane Co. v. NLRB*, 140 F. 2d 423, 10th Cir.; *Keystone Steel & Iron Co. v. NLRB*, 155 F. 2d 553, 7th Cir., vacated on other grounds 332 U. S. 833; *NLRB v. Montgomery Ward*, 157 F. 2d 486, 8th Cir.; *Rubin Bros. Footwear v. NLRB*, 203 F. 2d 486, 5th Cir.; *NLRB v. May Dept. Stores*, 154 F. 2d 533, 8th Cir., cert. den. 329 U. S. 725; *Marshall Field Co. v. NLRB*, 200 F. 2d 375, 7th Cir.; *Caterpillar Tractor Co. v. NLRB*, 230 F. 2d 357, 7th Cir.; *NLRB v. Edinburg Citrus Assn.*, 147 F. 2d 353, 5th Cir.; *NLRB v. American Thread Co.*, 210 F. 2d 381, 5th Cir.; *NLRB v. Clearwater Finishing Co.*, 216 F. 2d 608, 4th Cir.; *Milwaukee Electric Tool Co. v. NLRB*, 237 F. 2d 75, 7th

The ultimate question presented by the Petitioner to the Court of Appeals below, and to this Court, is whether or not the rule was invoked or applied, insofar as Parker, Rich, and others similarly situated are concerned, in a discriminatory manner or for a purpose interdicted by the National Labor Relations Act, as amended. The issue as to this is a pure and simple issue of fact. The Trial Examiner, whose Intermediate Report was, by virtue of the Decision of this Court in **Universal Camera v. NLRB**, 340 U. S. 474, 96 L. ed. 456,² a part of the Record as a whole to be considered by the reviewing Court of Appeals, found that the Respondent invoked its long-standing no-

Cir.; *NLRB v. Enid Cooperative Creamery*, 169 F. 2d 986, 10th Cir.; *Denver Tent & Awning Co. v. NLRB*, 138 F. 2d 410, 10th Cir.; *NLRB v. Mylan Sparta Co.*, 166 F. 2d 485, 6th Cir.; *NLRB v. Williamson Dickie Co.*, 130 F. 2d 260, 5th Cir.; *Bonwit Teller v. NLRB*, 197 F. 2d 640, 2nd Cir., cert. den. 345 U. S. 905; *NLRB v. Glenn L. Martin*, 141 F. 2d 371, 8th Cir.; *NLRB v. Brandeis & Sons*, 145 F. 2d 556, 8th Cir.; *NLRB v. American Tube Bending Co.*, 205 F. 2d 45, 2nd Cir.; *Peyton Packing Co. v. NLRB*, 142 F. 2d 1009, 5th Cir., cert. den. 323 U. S. 730; *NLRB v. Carter Carburetor Corp.*, 140 F. 2d 714, 8th Cir.; *NLRB v. F. W. Woolworth*, 214 F. 2d 78, 6th Cir.; *Midland Steel Products Co. v. NLRB*, 113 F. 2d 800, 6th Cir.

2 ". . . The 'substantial evidence' standard is not modified in any way when the Board and its examiner disagree. We intend only to recognize that evidence supporting a conclusion may be less substantial when an impartial, experienced examiner who has observed the witnesses and lived with the case has drawn conclusions different from the Board's than when he has reached the same conclusion. The findings of the examiner are to be considered along with the consistency and inherent probability of testimony. The significance of his report, of course, depends largely on the importance of credibility in the particular case. To give it this significance does not seem to us materially more difficult than to heed the other factors which in sum determine whether evidence is 'substantial'. . . . On reconsideration of the record it (the Court of Appeals) should accord the findings of the Trial Examiner the relevance they reasonably command in answering the comprehensive question of whether the evidence supporting the Board's order is substantial. . . ."

(*Universal Camera Corp. v. NLRB*, 340 U. S. 474, 496, 497, 95 L. ed. 456, 472.)

solicitation rule in keeping with its normal and traditional practice, procedure, and policy as to the invocation of all its rules; that the Respondent invoked the rule because of the actual and potential interference with its production, plant efficiency, and discipline which flowed from the widespread on-the-job solicitation which began in its several plants early in November, 1954; that the rule was not discriminatorily applied insofar as the three persons discharged were concerned; and that their discharges, as a result of their violations of the no-solicitation rule after being expressly warned against future violations of the rule, were not violative of the Act. The Intermediate Report clearly detailed the evidence in the Record, based upon the actual testimony, which supported the Trial Examiner's Findings as to the validity of the rule and the legality of the discharges, and particularly as to the discharges of Parker and Rich.

The Board, in its Order, reversed these Findings of its Trial Examiner. It did not, however, make any findings of facts which were contrary to those of the Trial Examiner insofar as the application of the no-solicitation rule to Rich and Parker was concerned as, indeed, it could not in the light of the evidence as to their subsequent specific violations of Respondent's no-solicitation rule after having been expressly warned that future violations would lead to discharge. Instead, the Board held their discharges violative of the Act as a result of its drawing inferences, contrary to the undisputed evidence, of alleged ulterior motives in the promulgation and invocation of the rule, namely, that Respondent's sole purpose in invoking its rule against employees' soliciting during their work time was to "impede the self-organizational efforts of its employees."

The basis upon which the Board predicated this inference, albeit, we submit, in conflict with the undisputed evidence, was:

(a) Because Respondent did not invoke or make its employees currently aware of its long-standing rule against solicitation during work time until after such solicitation had begun and until after it became sufficiently widespread to be apparent to Respondent; and

(b) Because when Respondent did invoke and bring to the attention of its employees its rule against solicitation during work time, it did so by the techniques and methods which Respondent had traditionally used to invoke and publicize all of its rules. In this connection the Board specified the practices and methods of publicizing such a rule which it preferred. It found that Respondent had an illegal motive in promulgating its rule since it followed a different method of publicizing it from that preferred by the Board. The evidence was clear that Respondent's normal method and procedure followed in connection with all of its rules was to orally notify employees individually of the existence of the rule and to caution them that future violation of the rule would result in discipline or discharge; and

(c) While the Board set forth no basis in the Record upon which it disagreed with the Findings of the Trial Examiner that this work time solicitation in Respondent's plants resulted in interference with production and plant efficiency, it nevertheless concluded that since Respondent had failed to make a quantitative showing in the Record of the "extent" to which the solicitation interfered with production, that it could conclude, in spite of the undisputed evidence to the contrary, that such solicitation during working hours did not "seriously" interfere with production or efficiency; and that, therefore, the rule must have been invoked for an illegal and discriminatory purpose, rather than for a purpose of relating to business necessity such as maintenance of production, efficiency, or discipline.

(d) The Board held that the fact that on four or five occasions subsequent to the invocation of the rule, Respondent's Supervisors interrogated or made remarks to employees while in the plant which it construed to be coercive or threatening, and the fact that "talking on a variety of subjects" was permitted in the plant by employees and Supervisors alike, proved that Respondent did not require a limitation on the non-work activity of its employees during work time for business purposes and that, therefore, Respondent's making and enforcing a rule prohibiting solicitation during work time was a "device" to defeat self-organizational rights of employees; and

(e) Finally, the Board found that assuming the rule was valid and non-discriminatory, that insofar as it was applied in the case of Jones it was discriminatory because, according to the Board, Jones did not in fact violate the letter of the rule subsequent to his being warned against future violations thereof.

When the case reached the Court of Appeals below, the questions to be determined as set out by the Petitioner in its Brief to the Court in support of its Petition for Enforcement, were:

"(1) Whether substantial evidence supported the Board's finding that Respondent violated Section 8 (a) (1) of the Act by discriminatorily promulgating or reviving its no-solicitation rule and violated Section 8 (a) (1) and (3) of the Act by discharging employees for violation of the rule.

"(2) Whether substantial evidence supported the Board's finding that Respondent discriminatorily discharged employee Jones in violation of Section 8 (a) (1) and (3) of the Act, even assuming that Respondent did not discriminatorily apply its rule against solicitation." (Emphasis supplied.)

Respondent in its Response and Answer to the Petition for Enforcement in the Court below denied that it had committed the alleged unfair labor practices and contended specifically:

“Respondent shows, moreover, that the said Decision and Order of the Board is not supported by substantial evidence in the Record considered as a whole . . . moreover, . . . the evidence in the Record considered as a whole sustains and supports the recommendation of the Board’s Trial Examiner that this Respondent did not discharge or otherwise discriminate against James M. Jones, John Rich, and Grover W. Parker in violation of Sections 8 (a) (3) or 8 (a) (1) of the National Labor Relations Act as amended . . . ” (R. I., 6).

On the issues thus drawn by the parties, the Court below in its Decision stated the issue as follows:

“The issues here are: 1. Whether substantial evidence on the record as a whole supports the Board’s finding that the Company’s no-solicitation rule was invoked and applied for discriminatory reasons, and 2, assuming that it was not, whether there is other substantial evidence to support the Board’s finding that Respondent discriminatorily discharged employee Jones” (Op. Court, below) (R. I., 133).

Thus the Petitioner and the Respondent argued and the Court below reached its Decision on the sole question of whether or not the evidence in the Record, considered as a whole, supported the Board’s Findings and Order.

The question as stated to this Court in the Petition for Certiorari purportedly departs from this actual factual issue and poses the question upon which certiorari was sought thusly:

“Whether a rule prohibiting employees from engaging in pro-union solicitation during working hours

otherwise valid under the tests enunciated by this Court is invalidly applied if the employer himself is engaging in unlawful, coercive, and anti-union solicitation during working hours" (Pet. for Cert. p. 2).

Petitioner's Brief to this Court on the merits shows moreover that Petitioner is actually seeking a reversal of the Decision below on the basis of its disagreement with the evaluation of and weight given by the evidence by the Court below. The Petitioner's position as set out in its Brief is:

"We nonetheless believe that the decision in this case should be reversed, as the conduct of the employer here establishes discriminatory motivation in the invocation and application of the no-solicitation rule. . . ." (Pet. Brief, page 13).³

Thus the issues actually before this Court in this matter are:

(1) The factual issue of whether or not the employees' solicitation during their work time interfered with Respondent's production, or was so related to production, plant efficiency, or discipline as to warrant its exercising

³ See also the concluding paragraph of Petitioner's Brief, where the Petitioner argues for reversal of the Decision of the Court below on the following basis:

"The court below conceded that an 'otherwise valid no-solicitation rule * * * cannot be invoked or applied for a discriminatory purpose.' It concluded, however, that since the evidence failed to establish that 'any solicitation in violation of the rule had ever been permitted,' the record lacked 'substantial evidence of an unlawful and discriminatory purpose in invoking and applying (the) no-solicitation rule' (R. I., 133-134). If the court's factual premise had any support in the record, then the difference between the Board and the court would involve no more than a mere disagreement between the two tribunals in their appraisal of conflicting evidence. But 'the facts are to the contrary * * *' National Labor Relations Board v. Warren Co., 350 U. S. 107, 110. . . ." (Pet. Brief p. 18).

its inherent right to invoke or revive its rule against solicitation during work time. In this particular the Trial Examiner found, based upon his evaluation of the evidence:

"The testimonies of Plant Superintendent Callaway and Pasley together with those of Foremen Gunter, Pickren, and Forbus indicate that the solicitation activity was interfering with production and plant efficiency. Therefore, it cannot be held that it was adopted and enforced without any regard to business necessity . . . when employees were leaving their jobs to solicit union membership of working employees. This is precisely what happened" (R. I, 99).

In its Decision, the Board, in spite of the above referred evidence held:

"There is no concrete evidence in the Record showing **the extent**, if any, that production was impaired by union solicitation" (R. I, 120). (Emphasis supplied.)

The Court below on its review and consideration of the Record as a whole, found:

"There is no dispute in the evidence that solicitation of Union membership during work hours had interfered with production and plant efficiency . . ." (R. I, 134).

(2) The factual issue growing out of Respondent's method of making employees aware of this rule and the timing of its invocation or revival. The Trial Examiner, based on the evidence and his observation of the witnesses, found:

" . . . (the plant rules, being unwritten, were matters of custom, some possibly dating back nearly 60 years.) . . ."

" . . . Immediately after becoming aware of the Union organizing campaign together with reports of

various employees attempting to solicit Union memberships during working hours from employees who were working, management invoked its so-called 'no-solicitation' rule . . . Other than for the annual Community Red Cross Drive, no solicitation of any kind was permitted in Avondale, as is evidenced by the warning previously given an employee, who was circulating a petition seeking a pardon for his son who was in the penitentiary . . . To argue that the rule was invalid because not formulated and entered until the Union adherents began soliciting is a philosophic non sequitor—otherwise the occasion would never have arisen . . ." (R. I, 73).

The Board, in disregard of the evidence, said in reversing the Trial Examiner:

" . . . Thus, instead of generally publicizing its newly adopted or revised rule to employees, as one would expect of an employer solely concerned with production and efficiency, the Respondent at the very inception of the Union's membership drive singled out a number of employees ostensibly suspected of engaging in union solicitation during working hours to be warned against a repetition of the reported offense . . ." (R. I, 118).

On this issue the Court below, on the basis of its review of the Record, as a whole, and its evaluation of the evidence, found:

" . . . the consistent policy of the company has been not to have written rules, but to rely upon rules and policies evolved from and proved workable in custom and practice, including a practice not to discipline an employee for violation of a rule until the rule had been expressly called to his attention and he had been advised that future violations would result in discharge or discipline. Such matters as hours of work, lunch periods, order in the plant, quality stand-

ards, etc., were all regulated by custom and no written rules were posted in the plant. . . .

" . . . There is no dispute in the evidence that solicitation of union membership during work hours had interfered with production and plant efficiency and that when that became obvious the Company took action by making its employees aware of the no-solicitation rule in the same manner that it made them aware of its other rules. That much the Company had a right to do. The fact that the rule had not been posted or otherwise publicized before the occasion for its use arose is consistent with the Company's practice as to all of its rules . . ." (R. I, 132, 134).

(3) On the issue of the application of the rule, insofar as Parker and Rich were concerned, the Trial Examiner found, on the basis of the evidence, as to Rich:

"Rich was called into the office at 10:30 the night of November 11th by Foreman Gunter, and in the presence of Forbus was read the warning against solicitation, and was told that ~~no~~ union activity would be permitted on the job. Rich admitted that he had given out a few cards but promised not to give out any more cards in the plant. This meeting ended with Rich asking: 'What does this mean, am I fired? And he said, No, you forget it and I'll forget it. He said, I don't want any more on the job.' However, Rich continued his advocacy of the union with employees in other departments during working time and on November 17th a week after he was warned, he was again reported to Gunter⁴ for soliciting on the job . . ." (R. I, 89).

⁴ According to Gunter, the reason for the suspension and subsequent termination of Rich was his solicitation of the elevator operator Glidden Holt on the November 17th shift. Rich, on cross-examination, also admitted 'soliciting one of the female employees for union membership while she was at work. Both worked

And, as to Parker:

" . . . Parker admitted that he had been soliciting on November 12th, but contended that he did not ask anybody to sign a card in the plant, and only at 'clean-up hours' or in the bathroom. During these times he had gotten Joe Baker, J. T. Downs, James Patterson, and Billy Craddock to sign up. Asked if he had solicited anyone to sign a card in the beaming room, Parker answered: 'I had them in the beaming room if they wanted to sign they could have.' The Trial Examiner found Parker's extensive testimony diffused, and his demeanor and deportment on the stand rendered his recitals suspect.

" Pickren's version was that he talked to Parker on two occasions, the first on Tuesday night, November 16th 'right at ten o'clock' and again Wednesday morning, November 17th. He testified that he said to Parker: 'We have already told you one time about soliciting on the job and it has been brought to my attention again. He said that he knew about it and said he didn't think he was going to get into trouble. I told him I was suspending him for 30 days . . . ' (R. I., 95).

" . . . In view of the corroboration of Pickren's testimony⁵ and the equivocal and diffusive testimony of

in departments other than his own. Subsequently Rich appeared before and appealed his suspension and discharge to Superintendent Callaway, Personnel Officer Cleghorn, B. H. Haynes, and finally the president of Avondale, J. Craig Smith—all of whom affirmed Rich's discharge for violating the rule, after warning against soliciting union memberships while on company time from persons who were working. The Company's definition was the literal application of the one set forth in the *Peyton Packing Company* case (*supra*), and Rich's discharge came within its purview. Accordingly, I shall recommend to the Board that the complaint be dismissed as to Rich" (R. I., 90, 91).

5 Thomas L. Craddock, a beamer tender ordinarily employed on the second shift, but who had asked for the third shift

Parker himself, the conflict is resolved in favor of Pickren's version. Accordingly, the Trial Examiner finds that Parker solicited union memberships of employees on the job after having been warned that such solicitation was in violation of a company rule, and his resultant discharge was not in violation of the Act as being discriminatory. Accordingly; it will be recommended to the Board that the allegation be dismissed . . ." (R. I, 97).

The Board, in its Decision, said:

" . . . That the Respondent was prompted to invoke the no-solicitation rule by a desire to prevent unionization of its employees rather than by consideration of plant production and efficiency, as the Respondent argues, is also indicated by the fact that talking on a variety of subjects was permitted in the plant. This included union discussions in which both employees and supervisors participated . . . "

" . . . Viewing the foregoing evidence in the light of the Respondent's other unfair labor practices, we are convinced that the Respondent invoked its so-called no-solicitation rule as a device to defeat its

on November 12th in order to attend a high school football game, was working on the 5th frame near Parker who was on the 9th frame. Craddock testified as to a conversation with Parker began, stating: 'At first he came in there when he first came to work, after the ball game when we first came to work, before we clocked in, he wanted to sign a union card. I told him I didn't want to sign one.' But, he stated that Parker came twice again to his frame during work, with the result that Craddock signed the card. Craddock subsequently reported the facts to Pickren."

" . . . Arthur D. Elrod, a tender on the first shift which follows the third shift on which Parker worked, testified that he came in at 5:30 on Wednesday, November 17th, and shortly thereafter Parker came into the bathroom 'where I was and asked me would I sign a card.' Unsuccessful at this time, Parker returned around 6' after he had gone on the job and requested him to sign a card, and also asked him to go to a union meeting. Elrod, likewise, reported the facts to Supervisor Pickren" (R. J, 96, 97).

employees' self-organizational efforts. Accordingly, we find, contrary to the Trial Examiner, that the Respondent thereby violated Section 8 (a) (1) of the Act. As Jones, Rich and Parker were laid off and ultimately discharged for violating this rule, we find that the Respondent discriminated against them within the meaning of Section 8 (a) (3) and (1) of the Act . . ." (R. I, 119, 120).

The Decision of the Court below in this particular was:

" . . . The evidence fails to establish that any solicitation in violation of the rule had ever been permitted. Nor does the fact alone that the Company was opposed to the Union, as was its lawful right, furnish substantial evidence of an unlawful and discriminatory purpose in invoking and applying its no-solicitation rule" (R. I, 134).

(4). On the final issue of whether or not the rule was discriminatorily applied as to Jones, the Trial Examiner found that it had not been (R. I, 94); but the Board, to the contrary, found:

" . . . We are convinced by . . . the Respondent's efforts to persuade Jones to cease his union activities, the summary nature of his layoff and discharge without giving him an opportunity to prove that he did not violate the rule, the fact that he did not engage in the prohibited solicitation, the statements made to Jones by ranking company officials, the Respondent's hostility to the Union as well as its other unfair labor practices, that it was Jones' adherence to the Union rather than his asserted disregard of a prior warning that motivated the Respondent in laying off and then discharging Jones. Accordingly, we find, contrary to the Trial Examiner, that apart from the question of the validity of the no-solicitation rule, the Respondent discrimi-

nated against Jones in violation of Section 8 (a) (3) and (1) of the Act . . ." (R. I, 122, 123).

In this connection, the Court below as a result of its examination of the Record, held:

" . . . Without detailing the other matters mentioned by the Board, we hold there was substantial evidence to support its findings on this second issue (the finding of discrimination in the discharge of Jones) . . ." (R. I, 134).

After the Court of Appeals rendered its Decision, the Petitioner filed a Motion for Rehearing and Brief (R. I, 135-137) in which it argued that the conduct of the Supervisors found violative of Section 8 (a) (1) of the Act constituted, as a matter of fact, "unlawful anti-union solicitation in violation of Respondent's rule," thereby making the rule invalid and the discharges of Rich and Parker violative of the Act.

In its Brief in Support of its Motion for Rehearing in the Court below, Petitioner again cited the several examples of conduct by Respondent's Supervisors which had been found to be violative of Section 8 (a) (1) of the Act (the same ones cited in the Brief in Support of the Petition for Enforcement). It again contended that the Court should reconsider and find that these instances should be given sufficient evidentiary weight to cause the Court to find that the Board's conclusions as to Respondent's no-solicitation rule and the application of the rule to Rich and Parker were in fact supported by substantial evidence in the Record as a whole. The Court below denied reconsideration.

We submit that these are all factual considerations which go to the question of weight, sufficiency, and validity of the evidence in the record, rather than questions of law.

The Petitioner in its Brief to this Court still bases its contentions on these same questions of substantiality, weight, and validity of the evidence in the Record. Thus, the Petitioner is, in the final analysis, asking this Court to again review the evidence in the Record in the instant matter to see if this Court, upon its appraisal of the evidence, would reach a different conclusion on the weight and sufficiency of the evidence than that arrived at by the Court below, and to reverse the decision of the Court below on the basis of such a different evaluation of the evidence, if, indeed, it was different.

This Court has made it clear that the evaluation of the evidence in the Record in an enforcement proceeding, under the Labor Relations Act, for the purpose of determining whether substantial evidence in the Record, considered as a whole, supports the Board's Order; is the function and responsibility of the Courts of Appeals; and that this Court will not review a conflict of evidence, or reverse a Court of Appeals because it, in its place, might have found the evidence "tilting" another way. **NLRB v. Pittsburgh Steamship Co.**, 340 U.S. 498, 502-503, 95 L. ed. 479, 482-483.⁶

⁶ "But Congress has charged the Courts of Appeal and not this Court with the normal and primary responsibility for granting or denying enforcement of Labor Board orders. The jurisdiction of the court (of appeals) shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review . . . by the Supreme Court of the United States upon writ of certiorari . . ." Taft-Hartley Act, Sec. 10 (e), 61 Stat. 148, ch. 120, 29 U. S. C. (Supp. III), Sec. 160 (e). Certiorari is granted only "in cases involving principles the settlement of which is of importance to the public as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the circuit courts of appeal." Layne & Bowler Corp. v. Western Well Works, 261 U. S. 387, 393, 67 L. ed. 712, 714, 43 S. Ct. 422; Revised Rules of the Supreme Court of the United States, Rule 38 (5). The same considerations that should lead us to leave undisturbed, by denying certiorari, decisions of Courts of Appeals involving solely a fair assessment of a record

We submit that it is clear that the question of whether or not Respondent's no-solicitation rule was invoked to intimidate or interfere with its employees in their self-organizational activities, rather than for other reasons, is a question of fact. We submit that the question of whether Respondent was motivated by a desire to block unionization in its mills or motivated by a desire to protect its production, efficiency, or discipline in invoking its no-solicitation rule is also a question of fact. We submit that the question of whether or not the alleged comments and interrogation by Supervisors provided sufficient evidence to establish a discriminatory application of the rule as to Parker and Rich or others is a question of fact. These questions of fact, which go to whether or not substantial evidence in the Record supports the conclusions of the Board, have been adversely determined to the contention of the Board by the Court below, after an examination and evaluation of the Record. Such a determination by the Court of Appeals should be sustained here.

on the issue of unsubstantiality, ought to lead us to do no more than decide that there was such a fair assessment when the case is here, as this is, on other legal issues.

"This is not the place to review a conflict of evidence nor to reverse a Court of Appeals because were we in its place we would find the record tilting one way rather than the other, though fair-minded judges could find it tilting either way. It is not for us to invite review by this Court of decisions turning solely on evaluation of testimony where on a conscientious consideration of the entire record a Court of Appeals under the new dispensation finds the Board's order unsubstantiated. In such situations we should adhere to the usual rule of noninterference where conclusions of Circuit Courts of Appeals depend on appreciation of circumstances which admit of different interpretations." Federal Trade Com. v American Tobacco Co., 274 U. S. 543, 544, 71 L. ed. 1193, 1194, 47 S. Ct. 663.

⁶NLRB v. Pittsburgh Steamship Co., 340 U. S. 498, 502, 503, 95 L. ed. 470, 482, 483.) (Emphasis supplied.)

B. The Full Measure of Self-Organizational Rights of Respondent's Employees Which the Act Grants Has Not Been Impaired. The Accommodation of These Rights Should Not Be Elevated to Such a Paramount Position as to Deprive Respondent of its Equally Important Rights. The discharges of Rich and Parker for Violation of Respondent's Rule and Directions After Being Warned Against Future Violations Were Discharges "for Cause" Within the Meaning of Section 10 (c) of the Act. The Board May Not Direct Reinstatement and Back Pay as to Employees So Discharged.

This Respondent is in full accord with the principle contended for by the Petitioner in its brief to the Court in case No. 815 at pages 16-43 thereof. That principle was expressed by this Court in its decision in **NLRB v. LeTourneau Company**, 324 U. S. 792, where the Court said at Pages 797-98, that rules regarding solicitation of Union membership and distribution of literature on an employer's premises evolve out of "adjustments between the undisputed right of self-organization assured to employees under the Wagner Act and the equally undisputed right of employers to maintain discipline in their establishment . . . opportunity to organize and proper discipline are both essential elements in a balanced society," and in its later decision in **NLRB v. Babcock and Wilcox Company**, 351 U. S. 105, where the Court said at Page 112, "organizational rights are granted to workers by the same authority, the national government, that preserves property rights. Accommodation between the two must be obtained with as little destruction of the one as is consistent with the maintenance of the other . . ." (Emphasis Supplied.) Respondent shows that in the instant matter such accommodation between self-organizational rights and property

⁵ *NLRB v. United Steelworkers of America, CIO, and Nutone, Inc.*, #815. A copy of said brief having been served upon this Respondent as noted in the Petitioner's brief in the instant matter.

rights has been made. The limitation on self-organizational rights imposed by Respondent's rule against solicitation during work time is somewhat less than that which it legally could have imposed under the controlling decisions of the Board and the Courts. See footnote one, *supra*.

The evidence in this Record, without dispute, establishes that in the instant matter the only limitation on the self-organizational rights of employees insofar as Respondent's premises and time are concerned is its limitation on its employees using their actual work time to engage in solicitation. There is no limitation, and neither the Board nor the Court below found a limitation, on the employees soliciting in the plants during non-work time, even though it be time for which Respondent compensates them, or on Respondent's premises at any time other than work time.

The evidence moreover shows that while Respondent has had a rule against solicitation during work time for some years, it has invoked it only in keeping with its usual practice, to wit: when it comes to its attention that a rule is being violated, such rule is again called to the attention of employees by warning those who have been observed, or reported violating the rule, that future violations of the rule will result in discipline or discharge. Respondent's policy on work time solicitation gives full accommodation to the self-organizational rights of its employees while on its premises. Certainly employees have ample opportunity to discuss unions or exercise their self-organizational rights on and off Respondent's premises. They have ample opportunity to solicit membership off Respondent's premises and on Respondent's premises during all times except during those times when employees are actually supposed to be working on their jobs. This includes periods when they are in the smoking areas, the rest rooms, and eating their lunches, while they are being paid by Respondent, and their pre- and post-shift time.

The statements or remarks by supervisors complained of by the Board herein do not diminish or deprive the

employees of their right to carry on legitimate activities or of the full accommodation of self-organizational rights to which they are entitled even though a rule against solicitation during the work time is enforced.

The Petitioner in its brief contends that Respondent's property and managerial rights, which include its right to require its employees to refrain from solicitation or other outside activity during the periods they are supposed to be at work, are rights which it, and other employers, have only by sufferance of the Board and that they are subject to such limitations as the Board may in its discretion impose. The Board at Page 15 of its brief sets forth this contention as follows:

"In short, the Board making an adjustment between the competing interests and rights, permits an employer to limit the Section 7 right of the employees to engage in solicitation where the abridgement . . . is solely for the purpose of assuring the employer of the employees' full attention to work during working hours."

Neither Section 7 nor any other provision of the Act gives or implies that the Board shall have such complete control over an employer's business; nor may the Board give self organization rights under the act such paramount status over property and all other rights.⁸

Nevertheless under the Petitioner's concept here, unless the employer satisfies the Board that it is prohibiting employees from engaging in solicitation when they are

⁸ "It is sufficient for this case to observe that the Board has not been commissioned to effectuate the policies of the Labor Relations Act so single-mindedly that it may wholly ignore other and equally important Congressional objectives. Frequently the entire scope of Congressional purpose calls for careful accommodation of one statutory scheme to another, and it is not too much to demand of an administrative body that it undertake this accommodation without excessive emphasis upon its immediate task."

(*Southern S. S. Co. v. NLRB*, 316 U. S. 31, 47, 62 S. Ct. 886, 894.)

being paid to be at work and are supposed to be at work, **solely because of its concern for "undisturbed production,"** then the employer may not restrict solicitation by his employees on his premises even during the time that they are required by the nature of their jobs and the duties thereof to attend to their jobs.⁹

In the instant situation Respondent made clear to the two employees in question, and others, that they would be subject to discipline or discharge if they **in the future** utilized time when they were supposed to be working, or interfered with others who were at work, in order to engage in solicitation in the plants. The evidence is clear that such activity was being carried on in the plants at that time. Respondent in the exercise of its business judgment had a right to stop it if it felt that it did, or was likely to, interfere in any way with production, efficiency, or discipline. In the two discharges here involved, **after** the employees had been expressly warned to discontinue such activity in the future, they disregarded the warnings, engaged in solicitation of other persons during their own and the other persons' work time in defiance of Respondent's directions. These discharges for disregard of instructions and violation of a rule limiting their work time activity, we submit, were not illegal interference by Respondent with their right of self-organization nor did they impinge upon reasonable "minimum" accommodation of self-organizational rights to property and managerial rights.

We submit further that this is not a matter which the Board may evaluate from the standpoint of whether or not in **its** judgment the Respondent presented proof of the extent to which production was interfered with which

⁹ "The employer in his right of control over the property and employees is authorized to make reasonable rules for the conduct of the business and the employee is bound to obey such reasonable rules as part of his contract of hire."

(*Midland Steel v. NLRB*, 113 F. 2d 805, 806, 6th Cir.)

the Board regarded as sufficient to warrant its permitting Respondent to continue to exercise its inherent right to control its property and control the work time of its employees.¹⁰

Independently of its no-solicitation rule, we submit, Respondent had a legal right to direct the two employees here involved, and all other employees, not to leave their work for, or engage in, solicitation when they were supposed to be at work. It had a further right to discipline or discharge for disobedience of that instruction, which was clearly insubordination, as it did with the employees here involved, without being subject to an order directing reinstatement and back pay to them for so doing. This was the purpose enunciated by Congress in enacting the amendments to Section 10 (e) of the Act as part of the amendments embodied in the Taft-Hartley Act. See report of the Committee of Conference, Labor-Management Relations Act of 1947, H. Rept. No. 510, 80th Congress, First Session, June 3, 1947.¹¹ This Court has enunciated

¹⁰ ". . . Motives are notoriously susceptible of being misunderstood and hard to prove or to disprove. If an ordinary act of business management can be set aside by the Board as being improperly motivated, then, indeed, our system of free enterprise, the only system under which either labor or management would have any rights, is on its way out, unless the Board's action is scrupulously restricted to cases where its findings are supported by substantial evidence, that is, evidence possessed of genuine substance . . ." (NLRB v. Houston Chronicle Publishing Co., 211 F. 2d 848, 5th Cir.)

" . . . as we have so often said, management is for management. Neither Board nor Court can second-guess it or give it gentle guidance by over-the-shoulder supervision. Management can discharge for good cause, or bad cause, or no cause at all. It has, as the master of its own business affairs, complete freedom with but one specific, definite qualification: it may not discharge when the real motivating purpose is to do that which Section 8 (a)-(3) forbids . . ." (NLRB v. McGahey, 233 F. 2d 406, 412, 414, 5th Cir.)

¹¹ ". . . The House bill also included, in section 10 (e) of the amended act, a provision forbidding the Board to order reinstate-

the principle that "insubordination, disobedience or disloyalty is adequate cause for discharge." (NLRB v. Local Union 1229, IBEW, 346 U. S. 464, 474-5, 98 L. ed. 195, 203-4.)¹²

ment or back pay for any employee who had been suspended or discharged, unless the weight of the evidence showed that the employee was not suspended or discharged for cause. The Senate amendment contained no corresponding provision. The conference agreement omits the 'weight of evidence' language, since the Board, under the general provisions of section 10, must act on a preponderance of evidence, and simply provides that no order of the Board shall require reinstatement or back pay for any individual who was suspended or discharged for cause. Thus employees who are discharged or suspended for interfering with other employees at work, whether or not in order to transact union business, or for engaging in activities, whether or not union activities, contrary to shop rules, or for Communist activities, or for other causes (see Wyman-Gordon v. NLRB, 153 F. 2d 480), will not be entitled to reinstatement."

(U. S. Code Congr. Service, 1947, First Session, Page 1161, ¶ (Emphasis supplied.)

12 See also to like effect: *NLRB v. American Thread Co.*, 210 F. 2d 381, 5th Cir.; *NLRB v. Fulton Bag & Cotton Mills*, 175 F. 2d 675, 5th Cir.; *NLRB v. Goodyear Tire & Rubber Co.*, 129 F. 2d 661, 5th Cir.; *Stonewall Cotton Mills v. NLRB*, 129 F. 2d 629, 5th Cir.; *NLRB v. Robbins Tire & Rubber Co.*, 161 F. 2d 798, 5th Cir.; *NLRB v. Caroline Mills*, 5th Cir., 167 F. 2d 212; *NLRB v. Reynolds Corp.*, 168 F. 2d 877, 5th Cir.; *NLRB v. Ray Smith Transport Co.*, 193 F. 2d 142, 5th Cir.; *NLRB v. Thompson Products, Inc.*, 97 F. 2d 13, 6th Cir.; *NLRB v. Empire Furniture Co.*, 107 F. 2d 95, 6th Cir.; *NLRB v. Goshen Rubber & Mfg. Co.*, 110 F. 2d 432, 7th Cir.; *Kansas City Power & Light Co. v. NLRB*, 111 F. 2d 340, 8th Cir.; *Subin v. NLRB*, 112 F. 2d 326, 3d Cir.; *NLRB v. Martel Mills*, 114 F. 2d 624, 4th Cir.; *NLRB v. Wilson & Co.*, 123 F. 2d 411, 8th Cir.; *Dannen Grain & Milling Co. v. NLRB*, 130 F. 2d 321, 8th Cir.; *Interlake Iron Co. v. NLRB*, 131 F. 2d 129, 7th Cir.; *NLRB v. Citizens News Co.*, 134 F. 2d 970, 9th Cir.; *NLRB v. J. L. Brandeis & Sons*, 145 F. 2d 456, 8th Cir.; *Wyman & Gordon v. NLRB*, 153 F. 2d 480, 7th Cir.; *NLRB v. Kopman-Woracek Shoe Mfg. Co.*, 158 F. 2d 103, 8th Cir.; *NLRB v. Reynolds International Pen Co.*, 162 F. 2d 680, 7th Cir.; *NLRB v. People's Motor Express, Inc.*, 165 F. 2d 977, 4th Cir.; *NLRB v. Mylan Sparta Co.*, 166 F. 2d 485, 6th Cir.; *NLRB v. Enid Co-op Association*, 169 F. 2d 986, 10th Cir.; *NLRB v. West Ohio Gas Co.*, 172 F. 2d 685, 6th Cir.; *Albrecht v. NLRB*, 180 F. 2d 652, 7th Cir.; *NLRB v. Tennessee Coach Co.*, 191 F. 2d 456, 6th Cir.; *Indiana Metal Products Co. v. NLRB*,

For the foregoing reasons and particularly in the light of the provisions of Section 10 (e) of the Act as it has been interpreted by this Court and the Courts of Appeal, the decision of the Court below insofar as it found that neither Rich nor Parker was discriminatorily discharged by Respondent must be sustained independently of whether or not the Petitioner prevails in the **Nutone** case (supra).

C. The Act Prescribes and the Court Below Has Decreed the Traditional Specific Remedies for the Correction of the Unfair Labor Practices Found to Have Been Committed by Respondent. In Addition to These Adequate Remedies, the Board Seeks to Impose Additional Requirements Upon Respondent Which Are Punitive in Nature and Not Remedial and Which Result in a Forfeiture of Inherent Rights of Respondent. Such Punitive Remedies Are Beyond the Scope, Power, and Authority Vested in the Board by the Act.

The Act, the Board's Order, and the Decision of the Court below prescribed specific remedies which clearly correct any violation of Section 8 (a) (1) of the Act which may have been committed by Respondent's Supervisors as a result of their interrogating employees or making other statements found to be threatening or coercive. The Board's Order and the Decision of the Court below prohibit any such future conduct by requiring the Respondent, under the penalty of contempt, to cease and desist from such activities. The Decision of the Court below, moreover, directs that one employee who was discharged be reinstated with back pay because, upon consideration of all the evidence in the Record, the Court below determined that substantial evidence supported the Board's Finding that as to him the no-solicitation rule was discriminatorily applied. These remedies are in keeping with

202 F. 2d 613, 7th Cir.; *NLRB v. Clearwater Finishing Co.*, 203 F. 2d 938, 4th Cir.; *NLRB v. Wayside Press*, 206 F. 2d 862, 866, 9th Cir.

those traditionally followed by the Board and universally upheld by the Courts, and by inference, at least, approved by Congress in the enactment of the 1947 Amendments to the Act.¹³

Thus the Board's Order as enforced by the Court imposes the traditional remedies which rectify the unfair labor practices found and prohibit their future commission. What the Petitioner now seeks further is that the Respondent be subjected to an additional punitive order which would deprive it of its right to require its employees to devote their work time to their jobs and not to utilize such work time to engage in outside activities without permission if Respondent's supervisory employees discuss unions or make anti-union comments on Respondent's premises during the non-supervisory employees' working hours.

The rationalization upon which the Board relies in seeking this either ignores or deliberately evades the inevitable and apparent differences between the status and function of supervisory and non-supervisory employees. Clearly, industrial practice establishes that there is a substantial difference in the situation where non-supervisory employees desert their posts at will and leave the jobs which they are running, or are supposed to be running, to engage in solicitation, conversations, or activities extraneous to those jobs, and the situation involved when supervisory employees go to the work places of their subordinates while they are at work. The jobs of Respondent's Supervisors require them to move about, make themselves aware of the condition of their subordinate employees' jobs in their departments, instruct them, to communicate orders, directions, and information, and discuss theirs and the Company's production problems with them. It is the duty

¹³ *NLRB v. Gullett Gin Co.*, 340 U. S. 361, 365, 366, 95 L. ed. 338, 341, 342; *NLRB v. Seven-Up Bottling Co.*, 340 U. S. 344, 351, 97 L. ed. 377, 384.

of the non-supervisory employees to stay on their jobs and run them when they are supposed to be run. A non-supervisory employee violates that duty when he leaves his job without permission. Petitioner's contention here, if sustained by this Court, would give Respondent's non-supervisory employees carte blanche authority to leave their jobs even when they needed attention or required their presence, or to interfere with other employees who were at work, whenever they pleased. We submit that the Employer through its Supervisors has the right to permit, or refuse to permit, non-supervisory employees to leave their jobs in order to solicit or to carry on other non-work activities. If the Employer does not grant such permission or prohibits the activity during work time, we submit that the Board does not have the authority, statutory or otherwise, to direct or require the Employer to sanction or permit such activity during work time.

Supervisors normally go to the jobs of employees while at work. They engage in conversations with employees and, as a matter of fact, they cannot effectively perform their job of supervision unless they do so. As representatives of management and as part of their supervisory jobs, Supervisors in Respondent's plant have a right, and at times a duty, to talk to employees on their jobs. Supervisors are Respondent's principal channel of communication with its employees. Such right and duty of Supervisors does not give non-supervisory employees a concomitant right to leave their jobs and attend to matters not related to the job, without permission, much less when expressly forbidden.

Assuming that Supervisors may seek at times to persuade employees that unionization is not preferable or desirable from the Employer's standpoint, that is nevertheless a matter which they, as part of management, have a right to do even during work time, which is unmistakably "management's time," as contrasted with non-work time, which

is an employee's "own time." If, in so doing, Supervisors exceed the limits of the Act, the Act provides an effective remedy for the rectification of such situations. Such remedies have been invoked by the Board and enforced by the Courts.

The Decree of the Court below contains a specific prohibition against Respondent's Supervisors' engaging in illegal interrogation, making coercive or threatening remarks to employees or soliciting employees to withdraw from the Union, and directs the reinstatement with back pay of an employee found to have been discriminatorily discharged. These are the normal remedies for violations of Sections 8 (a) (1) and 8 (a) (3) when the Findings as to them are supported by substantial evidence in the Record. These are the sole remedies warranted in the instant matter. The additional remedies sought by the Board in this Court, and denied to it by the Court below, would be a mandate to Respondent that it may not prevent or interfere with its non-supervisory employees' utilizing its premises, its paid time, and their work time to carry on any activities they chose in the furtherance of "self-organizational" rights at any time they chose, so long as the Employer permitted its Supervisors to use its premises and its work time in order to communicate its views to its employees. Such additional remedies would thus result in a forfeiture of Respondent's normal rights in respect to its property, discipline, efficiency, and production,¹⁴ and would as a consequence be punitive, not remedial.

¹⁴ That the altercation may have arisen because of Timerman's advocacy of the union does not sustain the position of the Board, since the employer was within its rights in forbidding union advocacy during working hours

(*NLRB v. Clearwater Finishing Co.*, 216 F. 2d 608, 4th Cir.)

Under the statute and under the adjudicated cases enforcement of this order must be denied. To decide that a no-solicitation rule deprives the employer of the right to confer with his employees about any important matter, including unionization, is to deprive him of the freedom of speech specifically guaranteed by the Constitution and by Section 8 (c) of the Act. The Board

This Court has rejected the concept that Respondent may be required to make its premises available to the Union for its use as a penalty for its having discriminated against employees in the exercise of their rights under the Act. See in this connection **NLRB v. Stowe Spinning Company**; where the Court said:

" . . . If the Act permitted imposing such a penalty upon the employers, it would perhaps be appropriate to compel them to provide a meeting hall in lieu of those it kept the Union from obtaining. However, it is well established by decision of this Court that Sec. 10 (e) of the Act, 29 U. S. C. A., Sec. 160, 9 F. A. C., Title 29, Section 160, is remedial, not punitive. **Consolidated Edison Co. v. NLRB**, 305 U. S. 197, 83 L. ed. 126, 59 S. Ct. 206; **Republic Steel Corp. v. NLRB**, 311 U. S. 7, 85 L. ed. 6, 61 S. Ct. 77. In both cases, Chief Justice Hughes said for the Court 'this authority to order affirmative action does not go so far as to confer a punitive jurisdiction enabling the Board to inflict upon the employer any penalty it may choose because he is engaged in unfair labor practices, even though the Board be of the opinion that the policies of the Act might be effectuated by such an order'"

(**NLRB v. Stowe Spinning Co.**, 236 U. S. 226, 236, 93 L. ed. 638, 646.)

is not authorized to write into the Act a limitation that does not exist.

"The Board contends finally that its ruling must be upheld because of the 'economic power' of the employer and also because the plant or shop is a convenient place for the union to canvass for members. If this rule is to stand it will be applied to employers of very small resources as well as to the far flung Woolworth Company. Freedom of speech is guaranteed under the Constitution alike to the weak and the powerful. The Board is not authorized by construction and implication to limit the freedom of speech established in the Constitution and re-emphasized in Section 8 (c)."

(**NLRB v. E. H. Woolworth Co.**, 214 F. 2d 78, 81, 82, 83, 6th Cir.)

This Court has moreover held:

" . . . We do not think that Congress intended to vest in the Board a virtually unlimited discretion to devise punitive measures and thus prescribe penalties or fines which the Board may think would effectuate the purposes of the Act. We have said that this authority to order affirmative action does not go so far as to confer a punitive jurisdiction enabling the Board to inflict upon the employer any penalty it may choose because he is engaged in unfair labor practices even though the Board be of the opinion that the policies of the Act might be effectuated by such an order . . . the power to command affirmative action is remedial, not punitive . . . "

(**Consolidated Edison Co. v. NLRB**, 305 U. S. 197, 235-236, 83 L. ed. 126, 143-144.)

See also: **NLRB v. Pennsylvania Greyhound Lines**, 303 U. S. 261, 267-268, 82 L. ed. 831, 835-856.

CONCLUSION.

For the reasons stated above, it is respectfully submitted that the Decision of the Court of Appeals below should be affirmed.

Respectfully submitted,

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APPENDIX.

Statutes Involved.

Labor Management Relations Act, 1947, 61 Stat. 136, 29 U. S. C., Sec. 141 et seq., Sec. 10.

"(e) The testimony taken by such member, agent or agency or the Board shall be reduced to writing and filed with the Board. Thereafter, in its discretion, the Board upon notice may take further testimony or hear argument. If upon the preponderance of the testimony taken, the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of this Act: **Provided**, That where an order directs reinstatement of an employee, back pay may be required of the employer or labor organization, as the case may be, responsible for the discrimination suffered by him: **And provided further**, That in determining whether a complaint shall issue alleging a violation of section 8 (a) (1) or section 8 (a) (2), and in deciding such cases the same regulations and rules of decision shall apply irrespective of whether or not the labor organization affected is affiliated with a labor organization, national or international in scope. Such order may further require such person to make reports from time to time showing the extent to which it has complied with the order. If upon the preponderance of the testimony taken the Board shall not be of the opinion that the person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue an order dismissing the said com-

plaint. No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause. In case the evidence is presented before a member of the Board, or before an examiner or examiners thereof, such member, or such examiner or examiners, as the case may be, shall issue and cause to be served on the parties to the proceeding a proposed report, together with a recommended order, which shall be filed with the Board, and if no exceptions are filed within twenty days after service thereof upon such parties, or within such further period as the Board may authorize, such recommended order shall become the order of the Board and become effective as therein prescribed.

"(e) The Board shall have power to petition any circuit court of appeals of the United States (including the United States Court of Appeals for the District of Columbia), or if all the circuit courts of appeals to which application may be made are in vacation, any district court of the United States (including the District Court of the United States for the District of Columbia), within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceedings, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree

enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its members, agent, or agency, and to be made a part of the transcript. The Board may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. The jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate circuit court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U. S. C., title 28, secs. 346 and 347).